DOCKET

No. 07-21
Vide 07-25
Title: William Crawford, et al., Petitioners
v.
Marion County Election Board, et al.
Docketed: July 5, 2007
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (06-2218, 06-2317)
Decision Date: January 4, 2007
Rehearing Denied: April 5, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 2 2007	Petition for a writ of certiorari filed. (Response due August 6, 2007)
Jul 27 2007	Waiver of right of respondent Marion County Election Board to respond filed.
Aug 6 2007	Brief of State Respondents in opposition filed. VIDED.
Aug 20 2007	Reply of petitioners William Crawford, et al. filed. (Distributed)
Aug 22 2007	DISTRIBUTED for Conference of September 24, 2007.
Sep 17 2007	Supplemental brief of respondents State Respondents filed. VIDED. (Distributed)
Sep 25 2007	Petition GRANTED The case is consolidated with No. 07-25 and a total of one hour is allotted for oral argument. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioners' brief is filed. VIDED.
Oct 5 2007	Letter from petitioner Indiana Coalition on Housing and Homeless Issues waiving the right to file briefs on the merits in 07-21 and 07-25. VIDED.
Oct 11 2007	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the petitioners.
Oct 16 2007	Consent to the filing of amicus briefs in support of either party received from counsel for Indiana State respondents. VIDED.
Oct 17 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for the respondents Marion County Election Board, et al.
Oct 19 2007	Consent to the filing of amicus briefs in support of either party received from counsel for petitioners Indiana Democratic Party. VIDED.
Nov 5 2007	Joint appendix filed. VIDED. (Statement of costs filed)
Nov 5 2007	Brief of petitioners William Crawford, et al. filed.
Nov 9 2007	Brief amicus curiae of Professor Richard L.Hasen filed. VIDED.
Nov 9 2007	Brief amicus curiae of Asian American Legal Defense and Education Fund filed. VIDED.
Nov 12 2007	Brief amicus curiae of United States Congressman Keth Ellison filed. VIDED.
Nov 12 2007	Brief amici curiae of National Congress of American Indians, et al. filed. VIDED.
Nov 12 2007	Brief amici curiae of Cyber Privacy Project, et al. filed. VIDED.

Nov 12 2007 Brief amici curiae of Dr. Frederick C. Schaffer, et al. filed. VIDED.

Nov 12 2007 Brief amici curiae of Asian American Justice Center, et al. filed. VIDED.

Nov 13 2007 Brief amicus curiae of Professor Erwin Chemerinsky in Support of Neither Party filed. VIDED.

Nov 13 2007 Brief amici curiae of R. Michael Alvarez, et al. filed. VIDED.

Nov 13 2007 Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed. VIDED.

Nov 13 2007 Brief amici curiae of United States Senator Dianne Feinstien, and U.S. Representatives Robert A. Brady and Zoe Lofgren filed. VIDED.

Nov 13 2007 Brief amici curiae of AARP and National Senior Citizens Law Center filed. VIDED.

Nov 13 2007 Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. VIDED.

Nov 13 2007 Brief amici curiae of Historians and Other Scholars filed. VIDED.

Nov 13 2007 Brief amici curiae of National Law Center on Homelessness & Poverty, et al. filed. VIDED.

Nov 13 2007 Brief amici curiae of Electronic Privacy Information Center, et al. filed. VIDED.

Nov 13 2007 Brief amicus curiae of Mexican American Legal Defense and Educational Fund filed. VIDED.

Nov 13 2007 Brief amicus curiae of Rutherford Institute filed. VIDED.

Nov 13 2007 Brief amici curiae of League of Women Voters of Indiana Inc., et al. filed. VIDED.

Nov 13 2007 Brief amicus curiae of Association of Community Organizations for Reform Now filed. VIDED.

Nov 13 2007 Brief amici curiae of Christopher S. Elmendorf and Daniel P. Tokaji filed. VIDED.

Nov 13 2007 Brief amici curiae of Rock the Vote, et al. filed. VIDED.

Nov 13 2007 Brief amici curiae of Brennan Center for Justice, et al. filed. VIDED.

Nov 16 2007 SET FOR ARGUMENT ON Wednesday, January 9, 2008.

Nov 17 2007 Motion for leave to file amici brief filed by Current and Former State Secretaries of State. VIDED.

Nov 21 2007 CIRCULATED.

Dec 3 2007 Brief of State Respondents filed. VIDED. (Distributed).

Dec 3 2007 Brief of respondent Marion County Election Board filed. VIDED. (Distributed)

Dec 3 2007 Motion for leave to file amici brief filed by Current and Former State Secretaries of State GRANTED. VIDED.

Dec 4 2007 Record received from U.S.C.A. for the 7th Circuit. (1 box)

Dec 4 2007 Brief amicus curiae of Pacific Legal Foundation filed. (Distributed)

Dec 6 2007 Brief amicus curiae of Mountain States Legal Foundation filed. VIDED. (Distributed)

Dec 6 2007 Brief amicus curiae of Georgia Secretary of State Karen C. Handel filed. VIDED. (Distributed)

Dec 7 2007 Brief amici curiae of Democrat and Republican Election Professionals filed. VIDED. (Distributed)

Dec 10 2007 Brief amici curiae of Center for Equal Opportunity and Project 21 (Voter ID Impact Research) filed. VIDED. (Distributed).

Dec 10 2007 Brief amici curiae of U.S.Senators Mitch McConnell, et al. filed. VIDED. (Distributed)

Dec 10 2007 Brief amicus curiae of American Unity Legal Defense Fund filed. VIDED. (Distributed)

Dec 10 2007	Brief amicus curiae of Evergreen Freedom Foundation filed. VIDED. (Distributed)
Dec 10 2007	Brief amicus curiae of Republican National Committee filed. VIDED. (Distributed)
Dec 10 2007	Brief amicus curiae of Washington Legal Foundation filed. VIDED. (Distributed)
Dec 10 2007	Brief amicus curiae of Doris Anne Sadler filed. VIDED. (Distributed)
Dec 10 2007	Brief amicus curiae of Lawyers Democracy Fund filed. VIDED. (Distributed)
Dec 10 2007	Brief amicus curiae of United States filed. VIDED. (Distributed)
Dec 10 2007	Brief amici curiae of Texas, et al. filed. VIDED. (Distributed)
Dec 10 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Dec 10 2007	Brief amicus curiae of American Civil Rights Union filed. VIDED. (Distributed)
Dec 10 2007	Brief amicus curiae of Conservative Party of New York State filed. VIDED. (Distributed)
Dec 12 2007	Record received from U.S.D.C. for Southern District of Indiana. (1 box)
Dec 20 2007	Reply of petitioners William Crawford, et al. filed. (Distributed)
Jan 4 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.
Jan 9 2008	Argued. For petitioners: Paul M. Smith, Washington, D.C. For respondents: Thomas M. Fisher, Solicitor General, Indianapolis, Ind; and Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

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FILED

No. 07-21 JUL 2 - 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners in Case No. 06-2218 before the Court of Appeals for the Seventh Circuit, and before this Court, are William Crawford, Joseph Simpson, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP.

Respondents are the Marion County Election Board and the State of Indiana. The State of Indiana was allowed to intervene in this case by the district court.

Both at trial and on appeal this case was consolidated with a case brought by the Indiana Democratic Party and the Marion County Democratic Central Committee. (Appellate Cause No. 06-2317) The defendants in that case were Todd Rokita, sued in his official capacity as Indiana Secretary of State; J. Bradley King and Kristi Robertson, sued in their official capacities as co-directors of the Indiana Election Division; and the Marion County Election Board. Mr. Rokita and Mr. King remain in their offices. Ms. Robertson has been replaced by Pamela Potesta.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner United Senior Action of Indiana is a corporation incorporated in Indiana with its principal place of business in Indiana. It has no parent corporation and does not issue stock.

Petitioner Indianapolis Resource Center for Independent Living is a corporation incorporated in Indiana with its principal place of business in Indiana. It has no parent corporation and does not issue stock.

Petitioner Concerned Clergy of Indianapolis is a corporation incorporated in Indiana with its principal place of business in Indiana. It has no parent corporation and does not issue stock.

Petitioner Indianapolis Branch of the NAACP is a branch of the national NAACP, which is a corporation incorporated in New York with its principal place of business in Maryland. It does not issue stock.

Petitioner Indiana Coalition on Housing and Homeless Issues is a corporation incorporated in Indiana with its principal place of business in Indiana. It has no parent corporation and does not issue stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners herein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated January 4, 2007, is reported at 472 F.3d 949 (7th Cir. 2007) and is reprinted in the Appendix at App. 1 through App. 15. A timely petition for rehearing, with suggestion for rehearing en banc, was filed and was denied, with four judges dissenting, on April 5, 2007. The denial is reported at 484 F.3d 436 (7th Cir. 2007), and is reprinted in the Appendix at App. 150 through App. 155. The decision of the trial court is reported at 458 F. Supp. 2d 775 (S.D.Ind. 2006) and is reprinted in the Appendix at App. 16 through App. 149.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit is dated January 4, 2007. The Seventh Circuit's Order denying the petition for rehearing with suggestion for hearing en banc is dated April 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code § 3-11-8-25.1 provides that all voters seeking to vote in-person must present proof of identification in order to vote, unless they are voting in-person in a state licensed facility in which they reside. If the voter does not have identification, he or she may only submit a provisional ballot. The statute is reproduced in the Appendix at App. 156 through App. 158. Indiana Code § 3-11-10-1.2 states that this proof of identification is not required for mail-in absentee ballots. It is reproduced in the Appendix at App. 158.

Indiana Code § 3-11.7-5-2.5 specifies the steps that a prospective voter must go through, once a provisional ballot is cast, in order to have his or her provisional ballot counted after being refused the opportunity to cast a regular ballot. It is reproduced in the Appendix at App. 159 through App. 161.

Indiana Code § 3-5-2-40.5 defines "proof of identification" that must be produced to vote in-person as:

> a document that satisfies all the following:
>
> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
>
> (2) The document shows a photograph of the individual to whom the document was issued.
>
> (3) The document includes an expiration date, and the document:
>
> (A) is not expired; or
>
> (B) expired after the date of the most recent general election.
>
> (4) The document was issued by the United States or the state of Indiana.

STATEMENT OF THE CASE

A. Introduction

This case concerns the constitutionality of Indiana's highly restrictive voter identification statute that requires those seeking to vote in-person to produce photo identification issued by either the State or federal government. The record evidence shows that this voter identification requirement will deter eligible citizens from voting. As the record also demonstrates, the State has imposed this severe burden on the fundamental right to vote without any showing that it responds to an actual problem in an

appropriately tailored manner. The district court's jurisdiction was based on 28 U.S.C. § 1331 because this case presents issues arising under the United States Constitution.

B. Statement of the Facts and Legal Background

1. Voting in Indiana

Effective July 1, 2005, Indiana law was changed to require that, with one exception, persons seeking to vote in-person must present photo identification, issued by the United States or Indiana, that is not expired or expired after the date of the most recent general election. IND. CODE § 3-5-2-40.5. If the prospective voter does not present such identification, he or she must execute a provisional ballot. IND. CODE § 3-11-8-25.1(d).

If the voter executes a provisional ballot, and wants to have the vote counted, he or she must appear before the clerk of the circuit court or county election board no later than ten (10) days following the election and either provide the required proof of identification and execute an affidavit that he or she is the same person who voted previously by provisional ballot, or execute an affidavit indicating that the voter previously cast a provisional ballot and either is "indigent and unable to obtain proof of identification without the payment of a fee" or has a religious objection to being photographed. IND. CODE § 3-11.7-5-2.5(c)(2).

The only exception to the proof of identification requirement for in-person voters is if the person lives in a state licensed facility, such as a nursing home, and votes

there. IND. CODE § 3-11-8-25.1(e). In that case the person does not have to provide proof of identification.

Prior to the enactment of the new identification law, a person seeking to vote had only to sign a poll book at the polling place. The signature then could be compared to a photographic copy of the signature that was kept on file.[1] A challenge could be maintained to any voter suspected of misrepresenting his or her identity. (App. 29).

A person voting by absentee ballot generally does not have to provide identification in order to vote.[2] However, Indiana law restricts absentee ballots to voters who verify legitimate reasons that they are unable to present themselves at the polls. *See* IND. CODE § 3-11-10-24(a)(1)-(10). These reasons include: having a specific and reasonable expectation of being out of the county during the time polls are open; working in an election capacity; as well as being disabled, ill, elderly or caring for a disabled person. *Id.* The voter identification law challenged in this lawsuit did not change the identification requirements for absentee

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[1] The only time that a prospective voter had to provide identification in Indiana prior to the challenged law would be as prescribed by the Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666 (2002), 42 U.S.C. § 15483(b), which provides that the first time that a voter who registered by mail votes in a federal election the voter must present certain information for identification purposes. The voter must provide either "a current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." 42 U.S.C. § 15483(b)(2)(A)(i). If the voter provides this information with his registration application, he does not have to present it on election day.

[2] The one exception to this is imposed by HAVA so that the first time absentee voter who registered to vote by mail must present a copy of one of the items noted in Note 1, *supra*.

ballots. *See* IND. CODE § 3-11-10-1.2. The ballot is placed in a sealed envelope by the voter, who signs an affidavit on the envelope that verifies his or her identity. IND. CODE § 3-11-4-20. The signature is then compared to the ones on file at the time that the ballot is processed.

2. Some potential voters do not have the requisite photo identification

The parties agree "that the most likely source of acceptable identification is either the drivers' licenses or identification cards issued by the [Indiana Bureau of Motor Vehicles] BMV." (App. 31). The BMV has acknowledged "that there are persons who do not currently have a driver's license or identification card and who are, or who will be, eligible to vote at the next election." (App. 36). However, the BMV is unable to determine the precise size of this group. (*Id.*). A survey by AARP of Indiana notes that 3% of elderly registered voters surveyed do not have either a valid license or an identification card (App. 45). and 30% of these persons are not likely to obtain the identification, even if necessary to vote. The trial court had before it examples of a number of Indianapolis voters who are over 65 but who do not have either a license or identification card, a number of whom do not have a birth certificate. (App. 50 – App. 51). The director of petitioner United Senior Action, an Indiana elder organization, noted that many seniors do not have either a valid license or identification card. (App. 45). It is also not uncommon for persons with disabilities to lack current identification (*Id.*). Additionally, homeless persons, some of whom vote, frequently have lost all their possessions, including identification.

3. It is difficult for some Indiana residents to obtain the BMV identification

a. Multiple documents must be presented in order to obtain identification from the BMV

There is no cost charged by the BMV for an identification card to a person who does not have a current license and who will be at least eighteen (18) years of age at the time of the next election. IND. CODE 9-24-16-10. But, while an identification card can be obtained without payment of a fee, an applicant must nevertheless gather multiple documents in order to meet BMV requirements. *See* IND. ADMIN. CODE tit. 140, r. 7-4-3. Specifically, the applicant must present to the BMV a primary document, a secondary document, and one proof of Indiana residency, or two primary documents and one proof of Indiana residency. Acceptable primary documents include: a United States birth certificate with authenticating stamp or seal, a United States passport, United States documents showing that the person is a citizen born abroad, a United States military, veterans, or merchant marine card with a photograph, a United States veteran's universal access identification card with photograph, or an Indiana driver's license or learner/driver education permit *Id.* Secondary documents can include such things as a valid banking card, a Medicare or Medicaid card, or a valid photo identification card. *Id.* Proof of residency can be satisfied by any primary or secondary document that contains the applicant's name and current address, or another document containing such information. *Id.*

b. It is difficult for some to obtain their birth certificates

A prospective voter may face multiple hurdles and burdens in attempting to obtain the birth certificate that is necessary to obtain identification from the BMV. First, there is the cost of obtaining the birth certificate. Although the identification card in Indiana is free, the sealed birth certificate can range in cost from $12 to more than $20, depending on where the person was born. (App. 37 – App. 38).[3]

Second, in order to obtain the birth certificate the hopeful voter must produce identification. And there are persons who simply do not have the information necessary to obtain the birth certificate, regardless of cost. For example, in Marion County, which includes the City of Indianapolis, a person who has the money to obtain his or her birth certificate may go to the Health and Hospital Corporation of Marion County. But, in order to receive the certificate, the person must produce photo identification. If the person cannot produce the identification, he or she is referred to another office, the Indiana State Department of Health, at another location, where other, non-photographic forms of identification may be presented. (App. 38).

This bureaucratic maze leads to persons being unable to take or complete the steps necessary to obtain a birth certificate. The trial court noted that Lafayette Urban

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[3] Although Indiana law allows a voter to appear before the clerk or county election board and sign an indigency affidavit that the voter is unable to obtain proof of identification without payment of a fee, IND. CODE § 3-11.7-5-2.5(c)(2)(A), the Clerk of Marion County stated that it was not clear that the cost of a birth certificate would be deemed to be a fee within the statute and that there was no definition of indigency.

Ministries, an organization that provides assistance to needy families, assisted approximately 150 persons in 2004 in trying to obtain photo identification, but fully half of these failed to obtain the BMV identification because they did not have the necessary identification to obtain a birth certificate. (App. 36, n. 18).

Additionally, there are elderly persons, born outside the state of Indiana, who were not born in hospitals and do not have any record of birth to obtain. Even if a person born out-of-state has a birth record, it may take months to receive it.

c. Other difficulties in obtaining the BMV identification

As indicated above, more than a sealed birth certificate is necessary to obtain the required photo identification. Secondary documents and proof of residency are required. Obtaining all these documents may prove difficult. One BMV employee noted that of fifty (50) people she sees each week who are seeking licenses or identification cards, fully sixty percent (60%) are turned away because they do not have all of the required documents. The perils of this process are exemplified by one Indiana resident, originally from Massachusetts, who had to make three trips to the BMV over a period of many weeks in an effort to obtain photo identification so that she could vote in-person, only to be ultimately turned away because her birth certificate contained only her maiden name. (App. 37).

Homeless persons, some of whom have voted in the past, frequently have none of their identification documents and little ability to obtain them. For example, an

affidavit in the record discloses that one homeless person went to the BMV to obtain an identification card. He had a birth certificate and Social Security card, but was denied an identification card because, being homeless, he could not produce proof of a specific address.

4. The identification requirement will prevent or deter persons from voting and will have a negative impact on the petitioners

Petitioner William Crawford, a long-time member of the Indiana House of Representatives and a current candidate, represents one of the poorest districts in Indiana. He has been informed by persons at town meetings and other similar events that they do not have the required identification necessary to vote. This has been a similar complaint of members of the Indianapolis Branch of the NAACP who have noted that the Voter ID law will prevent them from voting. (App. 57).

Voters are deterred from voting not just by absolute prohibitions. Some qualified voters who have impediments placed in their paths will frequently respond by not even attempting to vote. (App. 46). Voters who are challenged frequently react to the challenge by leaving the polls and not voting, even if the challenge is not meritorious. (*Id.*). Petitioner Joseph Simpson specified that challenges will cause voters to leave the polls without voting and that he is aware that there are persons in his district who have voted in the past but do not have any photo identification. (App. 53).

In addition to having members negatively affected by the law, petitioner NAACP will be forced by the new law to

engage in educational and outreach efforts and to expend organizational resources to inform the public about the law. (App. 57). Petitioner Concerned Clergy of Indianapolis, a local civil rights organization, will have to expend its limited financial resources to assist persons with the costs associated with the law. (*Id.*). Petitioner Indianapolis Resource Center for Independent Living, a federally funded center for independent living for persons with disabilities, will have to devote more of its limited staffing resources to working with clients in order to try to collect the information necessary to obtain an identification card. (App. 55).

Petitioner United Senior Action has 15,000 members and is dedicated to advancing issues of interest to senior citizens. (App. 57). It has members who do not have birth certificates and, as indicated above, its Executive Director notes that, based on her experience and past conversations with members, many seniors do not have licenses or identification cards and the members will be discouraged from voting. (App. 45). Petitioner Indiana Coalition on Housing and Homeless Issues is a statewide coalition consisting of organizations that advocate for the homeless, as well as homeless persons. (App. 55 – App. 56). It has documented that homeless persons frequently do not have the identification necessary to vote in Indiana (App. 44, 56) and have difficulty in obtaining the underlying information necessary to be able to obtain the identification.

The evidence from Professor Marjorie Hershey, presented and relied upon by the Democratic Party plaintiffs in the trial court, substantiated the concerns that petitioners articulated. Professor Hershey noted that the Indiana law will chill the exercise of the franchise by, among others, the disabled, homeless, low-income and elderly,

and will further depress the already low voter turnout in Indiana relative to other states. (App. 43 – App. 44). The Seventh Circuit concluded that although the "vast majority of adults" in Indiana possess the requisite identification to vote, "the Indiana law will deter some people from voting." (App. 3).

5. The purpose of the law is fraud prevention, but there is no evidence that in-person impersonation fraud has ever occurred in Indiana

The articulated purpose for the voter identification law is to combat voter fraud. (App. 106). However, the State of Indiana is not aware of any incidents of attempted or successful in-person impersonation voting fraud that have ever occurred within the State. (App. 39). Indeed, no person has ever been charged with any crime relating to voting fraud associated with in-person voting in Indiana. (*Id.*). Veteran poll watchers have seen no evidence of in-person voting fraud. (*Id.*). On the other hand, there is evidence of fraud associated with absentee ballot voting in Indiana, although absentee balloting is not regulated by the identification law. (*Id.*).

C. Proceedings Below

The separate cases brought by the current petitioners and the Indiana and Marion County Democratic Parties ("Democrats") were consolidated by the trial court and the consolidated case was submitted on cross-motions for summary judgment. The petitioners argued that the voter identification law was unconstitutional inasmuch as it imposes a severe burden on the fundamental right to vote

and is not narrowly drawn to meet a compelling state interest.[4] In granting the respondents' summary judgment motion, the trial court held that the Democrats had standing and that petitioners Crawford and Simpson also had standing to assert the rights of voters who "inadvertently" cannot present photo identification. (App. 96). The trial court held that the other petitioners did not have standing. The trial court further held that the statute was constitutional in that it did not create a severe burden on the right to vote and that the law was reasonable.

A divided panel of the Seventh Circuit affirmed the trial court's decision. It concluded that, inasmuch as the Democrats clearly have standing, other standing arguments did not need to be addressed. It noted that "most people who don't have photo ID are low on the economic ladder." (App. 3). It recognized that "even very slight costs in time or bother or out-of-pocket expense deter many people from voting" and that the evidence demonstrated that "the Indiana law will deter some people from voting." (*Id.*). In analyzing the right to vote, the panel concluded that "the benefits of voting to the individual are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote)." (*Id.*). (Court's emphasis). The panel then also concluded that the number of persons deterred or disfranchised by the voter identification law was few and, the fewer the number of people who would be disfranchised by the law, "the less of

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[4] The petitioners also claimed that the voter identification requirements violated 42 U.S.C. § 1971(a)(2)(A) and the Indiana Constitution. The trial court found against petitioners on these arguments and they are not pursued before this Court.

a showing the state need make to justify the law." (App. 5). Given this deferential standard, the State's asserted interest in preventing fraud was deemed sufficient justification for the law. Judge Evans, in dissent, argued that Indiana's voter identification law imposed a severe burden on the right to vote on some portion of eligible voters and therefore should be subject to elevated judicial scrutiny which it cannot satisfy. Judge Wood, writing for the four judges dissenting from the denial of rehearing en banc, argued that this "Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters" and that if even one citizen is deprived of the right to vote, a severe burden on the right to vote is still present. (App. 154).

ARGUMENT

Reasons for Granting the Petition

Plenary review in this case is appropriate for two reasons. First, this case raises an issue of growing national importance regarding access to a fundamental right – an issue that is important for this Court to resolve before the next national elections in 2008. The question of the appropriate standard for reviewing voter identification requirements was left unaddressed in *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5 (2006) (*per curiam*), and is properly before the Court now. Second, the Seventh Circuit's decision conflicts with decisions of this Court regarding the appropriate legal standard to be applied to cases involving severe burdens on the right to vote, by erroneously focusing on the *number* of people whose fundamental right is burdened rather than on the *degree* of the burden and the strength of the state's justification for imposing it.

I. Given the fact that restrictive identification requirements are being implemented and considered throughout the United States, the question presented by this case should be decided now, because its resolution prior to the 2008 elections is of great national importance

Indiana's voter identification law is currently the most onerous in effect in the nation. Alone among the states, it requires Indiana voters to produce a state or federally issued photo identification in order to cast a non-provisional ballot in person. However, Indiana is not unique in imposing identification requirements on those seeking to exercise the right to vote, and the restrictive conditions imposed in Indiana are a harbinger of future regulations in other jurisdictions. These restrictions raise "an exceptionally important unresolved question of law" (Wood, J., dissenting from denial of rehearing en banc, App. 151). Petitioners respectfully submit that plenary review should be granted in this case so that the legal uncertainty surrounding these laws can be settled before they become an issue in the national elections of 2008.

The type of voter identification requirement at issue in this case marks a striking departure from the preexisting regime governing registered voters' access to the polls. Prior to 2002, few states had blanket voter identification requirements, and none categorically required photo identification.[5]

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[5] According to electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006* 13, http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf, there were 11 states prior to 2002 with identification requirements, although mandatory photo identification laws were not enacted until Indiana and Georgia's 2005 statutes. *Id.* at 13-14.

With the passage of HAVA in 2002, identification requirements were implemented nationwide for the limited group of first time voters in federal elections who had registered by mail. *See* 42 U.S.C. § 15483(b). Since that time, according to electionline.org, *Voter ID Laws (As of 10/17/06)*, www.electionline.org/Default.aspx?tabid=364, twenty-six states have adopted identification requirements that are more rigorous than the HAVA requirements. Two of these states require some form of identification, which can, but does not have to, include photo identification for all first time voters, regardless of how they registered to vote.[6] A number of states require that all voters produce some form of identification, which can include photo identification as well as other forms of identification.[7] Six of these states,

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[6] *See* KAN. STAT. ANN. § 25-2908(d); PA. STAT. ANN. tit. 25 § 3050.

[7] *See* ALA. CODE § 17-9-30; ALASKA STAT. § 15.15.225; ARIZ. REV. STAT. ANN. § 16-579(A) (The Arizona statute requires identification for in-person voters as well as requiring persons seeking to register to vote for the first time to present proof of citizenship. After a district court denied a preliminary injunction enforcement of the statute, *Gonzalez v. Arizona*, 2006 WL 3627297 (D. Ariz. 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007), a two-judge motions panel of the Ninth Circuit granted an interlocutory injunction that was vacated by this Court prior to the fall 2006 elections, *see Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5 (2006). On remand to the 9th Circuit, the plaintiffs "chose not to seek injunctive relief with respect to the in-person voting requirement" and the Court affirmed the denial of the preliminary injunction with respect to the voter registration requirement. 485 F.3d at 1046-47); ARK. CODE ANN. § 7-5-305(a); COLO. REV. STAT. ANN. § 1-7-110; CONN. GEN. STAT. ANN. § 9-261(a); DEL. CODE ANN. tit. 15, § 4937; KY. REV. STAT. ANN. § 117.227; MO. ANN. STAT. § 115.427 (Although the statute remains on the books in Missouri, it has been permanently enjoined, based on state constitutional violations, by the Missouri Supreme Court. *See Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006)); MONT. CODE ANN. § 13-13-114; N.M. STAT. ANN. § 1-12-7.1(D); N.D. CENT. CODE § 16.1-05-07; OHIO REV. CODE ANN. § 3502.16(B)(1)(a); OHIO REV. CODE ANN. § 3505.18(A)(1); S.C. CODE ANN. § 7-13-710; TENN. CODE ANN. § 2-7-112(c); TEX. ELEC.

(Continued on following page)

including Indiana, have statutory provisions requiring that in-person voters present photo identification, although in three of the states – Hawaii, South Dakota and Louisiana – the photo identification is requested at the time of voting, and if the voter does not have photo identification, there is still a method for the person to cast a regular ballot at the poll.[8]

In addition, legislative initiatives exist to enact more restrictive voter photo identification laws in various states. For example, the Governor of Wisconsin has vetoed a photo identification law on three occasions that has prompted a legislative push to amend the Wisconsin Constitution to provide for photo identifications for voters.[9]

CODE ANN. §§ 63.001, 63.008; VA. CODE ANN. § 24.2-643(B); WASH. REV. CODE ANN. § 29A.44.205.

[8] *See* FLA. STAT. ANN. § 101.043; GA. CODE ANN. § 21-2-417 (The current Georgia statute replaced an earlier one which imposed a strict photo identification requirement for those seeking to vote in-person. After a preliminary injunction was entered against the statute, *see Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), the statute was modified to its present form. A preliminary injunction was again issued against enforcement of the revised statute with respect to the July 18, 2006 Georgia primary. *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). Further proceedings in that case were stayed while the Georgia Supreme Court considered a state constitutional attack on the statute. The Georgia Supreme Court recently dismissed the challenge on standing grounds. *Perdue v. Lake*, ___ S.E.2d ___, 2007 WL 1660734 (Ga. 2007)); HAW. REV. STAT. § 11-136 (the statute states that identification shall be provided upon request and the website of the state of Hawaii notes that voters must have a picture identification. Voting in Hawaii, http://www.hawaii.gov/elections/voters/votehi.htm); LA. REV. STAT. ANN. § 18:562(A); S.D. CODIFIED LAWS § 12-18-6.1.

[9] Steven Walters, *Doyle vetoes voter ID bill, but fight continues*, JS ONLINE (MILWAUKEE JOURNAL SENTINEL) (Aug. 13, 2005) http://www.jsonline.com/story/index.aspx?id=348113&format=print.

In Mississippi, voter identification legislation has passed the state senate, although it has not received a vote in the state's house of representatives.[10] Earlier this year electionline.org reported that the following states were considering legislation or constitutional amendments that, if passed into law, would require some form of photo identification in order to vote without the use of a provisional ballot: Alabama (proposed constitutional amendment), Arkansas, California, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Nevada, New Mexico, North Carolina, and Tennessee.[11] And the Federal Election Integrity Act of 2006, H.R. 4844, which passed the House of Representatives, but was not acted upon by the Senate, would have amended HAVA to provide that all persons voting in-person in a federal election present a government-issued and valid photo identification. Moreover, local governments are now taking the initiative to pass ordinances that require photo identification from those seeking to vote in-person. For example, the City of Albuquerque, by ordinance, has sought to require city voters to display current and valid photo identification as a condition of voting in person in municipal elections, although the

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[10] Brett Kittridge, *Who Killed Voter ID in Mississippi?*, MAJORITY IN MISSISSIPPI (Mar. 21, 2007) http://majorityinms.wordpress.com/2007/03/21/who-killed-voter-id/.

[11] electionline.org, *2007 Voter ID Legislation*, http://electionline.org/ResourceLibrary/ElectionAdministrationHotTopics/2007VoterIDLegislation/tabid/1125/Default.aspx. This survey is dated as of April 11, 2007. Not mentioned in the survey is Texas, where passage of a voter photo identification law was narrowly blocked in May of 2007 by a minority of legislators in the state's senate. Terrence Stutz, *Ailing senator helps quash voter ID bill*, THE DALLAS MORNING NEWS (May 24, 2007), http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/DN-nuvoterid_ 24tex.ART.State.Edition2.43a99d8.html.

requirement has been enjoined by a district court as unconstitutional. *See ACLU of New Mexico v. Santillanes*, 2007 WL 782167 (D.N.M. 2007), *appeal pending*, No. 07-02057 (10th Cir.).[12]

All of the legislation, future legislative initiatives, and the case at bar present the same legal question: given that this Court has found that the right to vote is "a 'fundamental political right ... preservative of all rights,'" *Harper v. Virginia Board of Election,* 383 U.S. 663, 667 (1966) (internal citations omitted), and that there is simply "[n]o right ... more precious in a free country than that of having a voice in the election of those who make the laws," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), under what circumstances can voter identification laws that impose a severe burden on the ability of a segment of the population to vote be upheld as constitutionally valid?

The justification for identification requirements is invariably the desire to prevent fraud, although the proponents of voter identification laws, when challenged, have failed to present evidence of in-person impersonation fraud that would be remedied by the challenged laws. *See, e.g., Santillanes*, 2007 WL 782167 at *33 ("Defendant has presented no admissible evidence that the October 2005 City Charter amendment actually serves to combat an existing problem with voter impersonation fraud in municipal elections."); *Billups,* 406 F. Supp. 2d at 1361 ("Indeed, Secretary of State Cox pointed out that, to her knowledge, the State had not experienced one complaint of

[12] The trend of enacting or tightening photographic voter identification requirements is not likely to abate. *See* Note, *Developments in the Law – Voting and Democracy*, 119 HARV. L. REV. 1127, 1145 (2006).

in-person fraudulent voting during her tenure."); *Weinschenk*, 203 S.W.2d at 218 ("The Photo-ID Requirement could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri."). And, in this case, there is similarly no evidence of impersonation fraud in in-person voting in Indiana.

In *Purcell v. Gonzalez*, this Court reversed a stay of a voter identification law that had been issued by a two-judge motions panel of the Ninth Circuit. In so doing, this Court noted that there had been no factual findings made by the district court and that it was necessary to develop those facts before a decision on the merits. ___ U.S. ___, 127 S.Ct. at 7-8. This Court noted that the prevention of voting fraud is most certainly a compelling governmental interest. *Id.* at 7. But the Court did not answer the question of whether "the plaintiffs' strong interest in exercising the 'fundamental political right' to vote," *id., citing Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), can be severely burdened by the mere articulation of the desire to prevent future fraud, unsupported by evidence of past fraud. This question is especially pertinent where the state has in place "a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared," given this Court's previous determination that such measures are sufficient to combat general fraud concerns. *Dunn*, 405 U.S. at 353.[13]

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[13] Relevant Indiana statutes include IND. CODE §§ 3-14-2-11 (voting in improper precinct), 3-14-2-12 (voting in false name or duplicate voting), 3-14-2-14 (penalty for precinct officials who knowingly allow unauthorized voter), 3-14-2-16 (assorted election fraud), 3-14-5-1 (allowing for arrest of illegal voters and forwarding of affidavits to prosecutor), 3-14-5-3 (requiring that violations be reported to prosecuting attorney).

The Seventh Circuit recognized that Indiana's identification law is sufficiently onerous that the "law will deter some people from voting." (App. 3).[14] The panel's view that the harm to the individual is "elusive" and that the number of voters affected will be few led it to conclude that a strict level of scrutiny would be inappropriate because "the fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer." (App. 5). When the panel turned to the justification for the law, it did not dispute the evidence that there are no known examples of voting fraud in Indiana and that "no one – in the history of Indiana – had ever been charged with" crimes relating to in-person impersonation voting fraud. (App. 11, Evans, J., dissenting). The panel nevertheless found the large number of criminal statutes protecting against this precise form of voting fraud to be irrelevant. (App. 7). The panel hypothesized that photo identification was justified because election officials would be "unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature." (*Id.*). That is, the elections officials would not do their jobs. The panel hypothesized other reasons to conclude that impersonators would be hard to catch. (App. 7 – App. 8). The Seventh Circuit therefore credited an undocumented and

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[14] A similar conclusion was reached by the Task Force Report accompanying the 2001 Report of the National Commission on Election Reform co-chaired by Presidents Gerald R. Ford and Jimmy Carter estimated that some "6 to 10 percent of the American electorate does not have official state identification." *To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform*, Chapter VI- Verification of Identity, p. 4 (2001), http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf (last visited July 25, 2006).

hypothetical risk of fraud while hypothesizing that the existing protections in Indiana, both criminal and regulatory, would not be effective. Based on this, it upheld voter identification requirements that admittedly burden, and in some instances deny, the voting rights of Indiana residents who lack the required identification and who are disproportionately poor, elderly, and/or disabled. As Judge Wood noted in her dissent from the denial of rehearing en banc in this case, it is necessary to "decide what standard should govern review of such a law and what kind of empirical record must be assembled to support whatever standard it chooses." (App. 155). That question was left unanswered in *Purcell* but should be answered at this juncture.

The need to articulate the standard of review to be applied to voter identification laws is a fundamentally important constitutional question that should now be resolved by this Court. *See, e.g., Cook v. Gralike*, 531 U.S. 510, 518 (2001) (*certiorari* granted despite the lack of a circuit conflict concerning ballot provision because "the importance of the case prompted our grant of certiorari.") It is imperative that the questions surrounding such laws be addressed in advance of the national elections of 2008 so that voters will not be improperly denied or discouraged from voting and so that, for all voters, in all jurisdictions, the elections may occur without any taint of constitutional impropriety.

II. The Seventh Circuit's decision conflicts with decisions of this Court requiring strict scrutiny for laws that severely burden the right to vote

The logic utilized by the Seventh Circuit in this case is explicit. The panel concluded that although "the vast majority of adults have" the identification necessary to vote, "the Indiana law will deter some people from voting." (App. 3). This disfranchisement is not constitutionally significant, according to the panel majority, because the fewer the number of people who will "disfranchise themselves rather than go to the bother and, if they are not indigent and don't have their birth certificate and so must order a copy and pay a fee, the expense of obtaining a photo ID, the less of a showing the state need make to justify the law." (App. 5). That is, the harm to an individual voter is of no measurable legal consequence for, according to the panel majority, "a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote." (App. 3) (Court's emphasis). According to the panel, the right to vote cannot be deemed to be unconstitutionally burdened until, and unless, an unspecified minimal number of voters are precluded from voting. The Seventh Circuit found that evidence of a large enough number was wanting and therefore the Indiana statute was constitutional.

That holding rests on a fundamental misreading of this Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick,* this Court upheld Hawaii's ban on write-in voting because the Court concluded that it imposed only a limited burden on the right of voters to make political choices. *Id.* at 438-39. In reaching this conclusion, this Court relied on its earlier decision in a ballot access

case, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for the proposition that "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" 504 U.S. at 433 (internal citation omitted). Instead, the Court held "a more flexible standard applies" where a court in an election law challenge must "weigh 'the character and magnitude of the asserted injury'" to the constitutional right to vote against "'the precise interest put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 434, *quoting Anderson*, 460 U.S. at 789. Thus, under the *Burdick* standard, if the fundamental right to vote is "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (internal citation omitted). However, if "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment right of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (internal citation omitted).

Burdick, of course, was not a case about an eligible voter's ability to cast a ballot and have it counted. It was instead a case about the available range of candidates for whom a citizen could vote. *Burdick* most certainly does not conclude that a severe burden on the right to vote can be subjected to relaxed scrutiny because it does not disfranchise "too many" voters. Neither *Burdick,* nor any other decision from this Court, has altered this Court's jurisprudence that has consistently recognized that the right to vote is "individual and personal in nature," *Reynolds v.*

Sims, 377 U.S. 533, 561 (1964). *See also Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989) (voting is "a personal right" that is "a value in itself"). To the contrary, this Court has repeatedly and consistently recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555. Accordingly, "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Blumstein*, 405 U.S. at 336.

The judicial focus must therefore be on whether the challenged law seriously and unreasonably burdens the right of a particular voter to exercise his or her fundamental right to vote.[15] "This Court has held that a State may not dilute a person's vote to give weight to other interests . . . and a lesser rule could hardly be applicable to a complete denial of the vote." *Evans v. Cornman*, 398 U.S. 419, 423 (1970). Under the Seventh Circuit's rationale, this Court's decision in *Smith v. Allwright*, 321 U.S. 649 (1944), holding that the exclusion on racial grounds of a single voter from a party's primary election violated the Fifteenth

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[15] Of course, this serious and unreasonable burden may involve something short of absolute disfranchisement. Thus, this Court found the Ohio statute in *Anderson* unconstitutional because it placed "a particular burden" on Ohio's independent voters, not because it placed an impossible burden. 460 U.S. at 792. The Court of Appeals' insistence that petitioners demonstrate that there are voters who will be absolutely prohibited from voting (App. 5) is therefore erroneous. The showing of a serious and unreasonable burden on the right to vote is sufficient regardless of whether most voters may be unaffected by, or able to overcome, the burden.

Amendment and allowing the voter to pursue a claim for damages for the denial of this personal right, could no longer stand absent evidence that a sufficient number of potential voters were similarly disfranchised. The panel's decision in this case, which allows this fundamental personal right to be denied to some, if not to too many, is irreconcilable with this Court's precedents and introduces a calculus that undermines the fundamental right of individuals to vote.[16] Plenary review should be granted to correct this deviation from the core principle underlying this Court's voting rights jurisprudence.

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[16] In addition to erroneously allowing the fundamental right to vote to be denied if the denial does not affect too many persons, the panel's decision ignores the fact that, as noted by Judge Wood in her dissent from the denial of rehearing en banc, it is not unprecedented that elections are decided by a difference of only a few votes. (App. 153). There are similar examples in Indiana. *See, e.g., Horseman v. Keller*, 841 N.E.2d 164, 166 (Ind. 2006) (city council-person election decided originally by three votes, increasing to five votes after a recount); *Curtis v. Butler*, 866 N.E.2d 318 (Ind. Ct. App. 2007) (circuit court clerk certified as the winner of the election by three votes); *Hathcoat v. Town of Pendleton Election Board*, 622 N.E.2d 1352, 1354 (Ind. Ct. App. 1993) (town council election won by eight votes).

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

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472 F.3d 949

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 06-2218, 06-2317

WILLIAM CRAWFORD, *et al.*,

Plaintiffs-Appellants,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 1:05-cv-00634-SEB-VES –
Sarah Evans Barker, *Judge.*

Argued October 18, 2006 – Decided January 4, 2007

Before POSNER, EVANS, and SYKES, *Circuit Judges.*

POSNER, *Circuit Judge.* A number of candidates for public office, and voters, along with organizations such as the Democratic Party that are active in electoral politics, challenge a new Indiana voting law as an undue burden on the right to vote, a right that the Supreme Court has found latent in the Constitution. E.g., *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184

(1979), and cases cited in *Igartua-De La Rosa v. United States,* 417 F.3d 145, 169-70 (1st Cir. 2005). The law requires, with certain exceptions, that persons wanting to vote in person in either a primary or a general election must present at the polling place a government-issued photo ID (see Ind. Code § 3-5-2-40.5), Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1), unless the person either wants to vote by absentee ballot (and is eligible to do so) or lives in a nursing home. Ind. Code §§ 3-11-8-25.1(e), 3-11-10-1.2. The district court granted summary judgment for the defendants. *Indiana Democratic Party v. Rokita,* 2006 U.S. Dist. LEXIS 20321 (N.D. Ind. Apr. 14, 2006).

Until the new law went into effect, someone who wanted to vote in person and was not voting for the first time just had to sign the poll book at the polling place; "there would generally be a photographic copy of the signature [on file] that would be compared" by the staff with the signature in the poll book. *Id.* at *18-*19. The new law's requirement that the would-be voter present a government-issued photo ID, such as a passport or a driver's license, is no problem for people who have such a document, as most people do. Nor is it a problem for people who vote by absentee ballot or who live in nursing homes – and anyone 65 or over can vote by absentee ballot. But what about people who do not have photo IDs and must vote in person, if they vote at all, because they don't live in nursing homes and are ineligible to cast absentee ballots, though the eligibility requirements are not stringent (see Ind. Code § 3-11-10-24, and compare *Griffin v. Roupas,* 385 F.3d 1128, 1129 (7th Cir. 2004), discussing the Illinois requirements)? They can get a photo ID from the Indiana motor vehicle bureau by presenting their birth certificate (or certificate of naturalization if they were born outside

the United States) or a certified copy, plus a document that has their name and address on it, such as a utility bill. Both the indigent and the nonindigent who does not have (or have with him) a photo ID can, if challenged, cast a provisional ballot and then has 10 days either to file an indigency affidavit or to procure a photo ID. Ind. Code §§ 3-11.7-5-2.5, 3-11-8-23, 3-11-8-25.1.

Even though it is exceedingly difficult to maneuver in today's America without a photo ID (try flying, or even entering a tall building such as the courthouse in which we sit, without one; see *United States v. Smith,* 426 F.3d 567 (2d Cir. 2005)), and as a consequence the vast majority of adults have such identification, the Indiana law will deter some people from voting. A great many people who are eligible to vote don't bother to do so. Many do not register, and many who do register still don't vote, or vote infrequently. The benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote), and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in. So some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote, rather than go home and get the ID and return to the polling place.

No doubt most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates. Exit polls in the recent midterm elections show a strong

negative correlation between income and voting Democratic, with the percentage voting Democratic rising from 45 percent for voters with an income of at least $200,000 to 67 percent for voters having an income below $15,000. "Exit Polls," http://www.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html; see also Jeffrey M. Stonecash, *Class and Party in American Politics* 114 (2000) (tab. 5.7). Thus the new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote. See *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378 (1982); *Smith v. Boyle,* 144 F.3d 1060, 1061-63 (7th Cir. 1998). The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 180-84 (2000); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 690 n. 14 (1973); *520 Michigan Avenue Associates, Ltd. v. Devine,* 433 F.3d 961, 962-63 (7th Cir. 2006); *Baur v. Veneman,* 352 F.3d 625, 633-34 (2d Cir. 2003). The Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting by the new law. *Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565, 573-74 (6th Cir. 2004); see also *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

The standing of the many other plaintiffs in these consolidated suits – candidates, voters, organizations – is less certain, but need not be addressed. Only injunctive relief is sought, and for that only one plaintiff with standing is required; and the Democratic Party has standing.

Texas Democratic Party v. Benkiser, 459 F.3d 582, 585-86 (5th Cir. 2006); *Schulz v. Williams,* 44 F.3d 48, 50-53 (2d Cir. 1994); *Owen v. Mulligan,* 640 F.2d 1130, 1131-33 (9th Cir. 1981); see *Libertarian Party v. Rednour,* 108 F.3d 768, 770 (7th Cir. 1997).

But there is something remarkable about the plaintiffs considered as a whole, which will provide the transition to our consideration of the merits. There is not a single plaintiff who intends not to vote because of the new law – that is, who would vote were it not for the law. There are plaintiffs who have photo IDs and so are not affected by the law at all and plaintiffs who have no photo IDs but have not said they would vote if they did and so who also are, as far as we can tell, unaffected by the law. There thus are no plaintiffs whom the law will deter from voting. No doubt there are at least a few such people in Indiana, but the inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests that the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls.

The fewer the people who will actually disfranchise themselves rather than go to the bother and, if they are not indigent and don't have their birth certificate and so must order a copy and pay a fee, the expense of obtaining a photo ID, the less of a showing the state need make to justify the law. For the fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer. The argument pressed by the plaintiffs that any burden on the right to vote, however slight it is or however meager the number of voters affected by it, cannot pass constitutional muster unless it

is shown to serve a compelling state interest was rejected in *Burdick v. Takushi,* 504 U.S. 428, 433-34 (1992). The Court said that "election laws will invariably impose some burden upon individual voters.... [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." See also *Anderson v. Celebrezze,* 460 U.S. 780, 788-90 (1983), where the Court pointed to the need to "consider the character and *magnitude* of the asserted injury" (emphasis added); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997); *Storer v. Brown,* 415 U.S. 724, 730 (1974); *Schulz v. Williams,* 44 F.3d 48, 56 (2d Cir. 1994).

A strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger. See *Purcell v. Gonzalez,* 127 S. Ct. 5, 7, 166 L.Ed.2d 1 (2006) (per curiam); cf. *Burson v. Freeman,* 504 U.S. 191, 198, 206, 211 (1992). The Indiana law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest in defraying the cost of elections or in limiting the franchise to people who really care about voting or in excluding poor people or in discouraging people who are black. The purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote. *Purcell v. Gonzalez, supra,* 127 S. Ct. at 7; *Reynolds v. Sims,* 377 U.S. 533, 555 (1964); *Siegel v. LePore,* 234 F.3d 1163, 1199 (11th Cir. 2000). On one side of the balance in this case is the effect of requiring a photo ID in inducing eligible voters to disfranchise

themselves. That effect, so far as the record reveals, is slight. The principal evidence on which the plaintiffs relied to show that many voters would be disfranchised was declared by the district judge to be "totally unreliable" because of a number of methodological flaws; and we accept her finding.

On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at the polls claiming to be someone else – someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature. The plaintiffs point out that voting fraud is a crime, see, e.g., Ind. Code § 3-14-2-12, and they argue that the penalty (six months to three years in prison plus a fine of up to $10,000, Ind. Code § 35-50-2-7) should suffice to deter the crime. They further note that as far as anyone knows, no one in Indiana, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter.

But the absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator. He enters the polling place, gives a name that is not his own, votes, and leaves. If later it is discovered that the name he gave is that of a dead person, no one at the polling place will remember the face of the person who gave that name, and if someone did remember

it, what would he do with the information? The impersonator and the person impersonated (if living) might show up at the polls at the same time and a confrontation might ensue that might lead to a citizen arrest or a call to the police who would arrive before the impersonator had fled, and arrest him. A more likely sequence would be for the impersonated person to have voted already when the impersonator arrived and tried to vote in his name. But in either case an arrest would be most unlikely (and likewise if the impersonation were discovered or suspected by comparing signatures, when that is done), as the resulting commotion would disrupt the voting. And anyway the impersonated voter is likely to be dead or in another district or precinct or to be acting in cahoots with the impersonator, rather than to be a neighbor (precincts are small, sometimes a single apartment house). One response, which has a parallel to littering, another crime the perpetrators of which are almost impossible to catch, would be to impose a very severe criminal penalty for voting fraud. Another, however, is to take preventive action, as Indiana has done by requiring a photo ID.

The plaintiffs argue that while vote fraud by impersonation may be a problem in other states, it is not in Indiana, because there are no reports of such fraud in that state. But that lacuna may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate. Some voter impersonation has been found (though not much, for remember that it is difficult to detect) in the states that have been studied, and those states do not appear to be on average more "dishonest" than Indiana; for besides the notorious examples of Florida and Illinois, they include Michigan, Missouri, and Washington (state). Indirect evidence of such

fraud, or at least of an acute danger of such fraud, in Indiana is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote. The defendants' expert estimated that the registration rolls contained 1.3 million more names than the eligible voters in Indiana. This seems too high, but the plaintiffs' expert acknowledged that the rolls are inflated. How many impersonations there are we do not know, but the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting.

The plaintiffs point out that the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(4), requires all states to purge their registration rolls of ineligible voters. See also the Help American Vote Act, 42 U.S.C. § 15301, particularly § 15483(a)(4)(B). The purge has not yet been completed in Indiana. One thing that is slowing it down is that removing a name from the voter registration roll requires notice to a registered voter whose address appears from postal records to have changed, and only if a voter fails to respond to the notice and fails to vote in two successive federal elections can the state remove him from the rolls. 42 U.S.C. §§ U.S.C. §1973gg-6(c), (d). And when the purge *is* completed, it is likely to eliminate many more eligible voters than the new Indiana law will do, cf. Jeffrey A. Blomberg, "Note: Protecting the Right Not to Vote From Voter Purge Statutes," 64 *Fordham L. Rev.* 1015, 1016-17 (1995), yet provide only a short-term solution, since as soon as the purge is complete the inflation of the registration rolls will recommence.

The plaintiffs complain that the new Indiana law is underinclusive because it fails to require absentee voters

to present photo IDs. But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo. Cf. *Griffin v. Roupas, supra,* 385 F.3d at 1130-31.

Perhaps the Indiana law can be improved – what can't be? – but the details for regulating elections must be left to the states, pursuant to Article I, section 4, of the Constitution, which provides that "the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." "To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'" *Clingman v. Beaver,* 544 U.S. 581, 593, 125 S. Ct. 2029, 161 L.Ed.2d 920 (2005), quoting the *Timmons* case cited earlier; see also *Anderson v. Celebrezze, supra,* 460 U.S. at 788; *Griffin v. Roupas, supra,* 385 F.3d at 1130-31.

Regarding the plaintiffs' other arguments, we have nothing to add to the discussion by the district judge. The judgment for the defendants is

AFFIRMED.

EVANS, Circuit Judge, dissenting. Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny – or at least, in the wake of *Burdick v. Takushi*, 504 U.S. 428 (1992), something akin to "strict scrutiny light" – and strike it down as an undue burden on the fundamental right to vote.

The percentage of eligible voters participating in elections has, for many years, been on a downward trajectory. With that being the case, one would think states should be looking for creative ways (like allowing people to vote at places they frequent and are familiar with, like shopping malls rather than basements of fire stations) to increase voter participation. Yet, the Indiana law we sanction today does just the opposite. Constricting the franchise in a democratic society, when efforts should be instead undertaken to expand it, is not the way to go.

The fig leaf of respectability providing the motive behind this law is that it is necessary to prevent voter fraud – a person showing up at the polls pretending to be someone else. But where is the evidence of that kind of voter fraud in this record? Voting fraud is a crime (punishable by up to 3 years in prison and a fine of up to $10,000 in Indiana) and, at oral argument, the defenders of this law candidly acknowledged that no one – in the history of Indiana – had ever been charged with violating that law. Nationwide, a preliminary report to the U.S. Election

Assistance Commission has found little evidence of the type of polling-place fraud that photo ID laws seek to stop. If that's the case, where is the justification for this law? Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table? I think not.

Indiana law provides that a voter shall be challenged at the poll and required to vote only by provisional ballot if: (1) "the voter is unable or declines to present the Proof of Identification" or (2) a member of the precinct election board determines that the Proof of Identification provided by the voter does not qualify as Proof of Identification under the law. "Proof of Identification" is defined as a document that satisfies all the following:

> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
>
> (2) The document shows a photograph of the individual to whom the document was issued.
>
> (3) The document includes an expiration date, and the document:
>
> (A) is not expired; or
>
> (B) expired after the date of the most recent general election.
>
> (4) The document was issued by the United States or the State of Indiana.

The potential for mischief with this law is obvious. Does the name on the ID "conform" to the name on the voter registration list? If the last name of a newly married woman is on the ID but her maiden name is on the registration list, does it conform? If a name is misspelled on one

– Schmit versus Schmitt – does it conform? If a "Terence" appears on one and a shortened "Terry" on the other, does it conform?

But these are perhaps minor concerns. The real problem is that this law will make it significantly more difficult for some eligible voters – I have no idea how many, but 4 percent is a number that has been bandied about – to vote. And this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof. I would suspect that few, if any, in this class have passports (which cost in the neighborhood of $100), and most don't have drivers licenses (who needs a drivers license if you don't drive a car?) or state-issued ID cards which require valid (certified) birth certificates. And it's not particularly easy for a poor, elderly person who lives in South Bend, but was born in Arkansas, to get a certified copy of his birth certificate.

Now I certainly agree with my brother Posner that "it is exceedingly difficult to maneuver in today's America without a photo ID." But Indiana's law mostly affects those who, for various reasons, lack any real maneuverability at all. And lest one thinks that those who have maneuverability are immune from running into trouble with this law, consider this anecdotal tidbit.

The *Washington Post* (Nov. 3, 2006) reported that on Indiana's primary election day, Rep. Julia Carson[1] shoved

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[1] Ultimately, Carson, a Democrat, won her seat with a 54-46 advantage over her Republican opponent. Although it was not in the Hoosier state, Mark Sanford, the Republican governor of South Carolina, was prevented from voting last month when he showed up at his polling station without the correct ID to vote.

her congressional identification card in a pocket, ran out of her house and raced down the street to be at her polling site when it opened at 6 a.m. Carson, seeking to represent an Indianapolis district for a sixth term, showed the card to a poll worker, who said it was unacceptable under a new state law that requires every voter to show proof of identity with a certain type of photo ID. But Carson, after being turned away, went home and later returned to their polling places to cast her vote. Would most people, especially those without a vested interest in the system, do the same thing? I doubt it.

I believe that most of the problems with our voting system – like deceased persons or felons on registration rolls, machines that malfunction, and confusing ballots (think butterfly) – are suggestive of mismanagement, not electoral wrongdoing. And I recognize that there is, and perhaps there may always be, a fundamental tension between claims of voter fraud and fears of disenfranchisement. But Indiana's law, because it allows nothing except a passport or an Indiana ID card to prove that a potential voter is who he says he is, tips far too far in the wrong direction.

Burdick, which concerned a challenge to a Hawaii law that did not require the counting of write-in votes, put to rest the notion that strict scrutiny applies to every law that imposes a burden on the right to vote. As the Court observed:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . .

> Instead, . . . [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 433-34 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983)); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 213-14 (1986).

So *Burdick* adopts a flexible standard, and as I read it, strict scrutiny may still be appropriate in cases where the burden, as it is here, is great and the state's justification for it, again as it is here, is hollow. At the very least, I would apply a standard here that would at least be something close to "strict scrutiny light." Applying that standard, I would conclude that Indiana's law imposes an undue burden on a recognizable segment of potential eligible voters and that it therefore violates those voters' rights under the First and Fourteenth Amendments to the Constitution.

A true Copy:
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Clerk of the United States
Court of Appeals for the
Seventh Circuit

458 F. Supp. 2d 775

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,	)	
Plaintiffs,	)	
vs.	)	1:05-CV-0634-SEB-VSS
TODD ROKITA, et al.,	)	
Defendants.	)	

ENTRY GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFFS' MOTIONS TO STRIKE[1]

(Filed Apr. 14, 2006)

This matter is before the Court on Plaintiffs' and Defendants' cross motions for summary judgment. Plaintiffs have brought their constitutionally-based lawsuit seeking injunctive relief and declaratory judgment to challenge the recent enactment by the Indiana General Assembly requiring that registered voters present photo identification at the polls in order to vote, pursuant to Senate Enrolled Act No. 483, codified at Ind. Code §§ 3-5-2-40.5; 3-10-1-7.2; 3-10-8-25; scattered sections of Ind. Code ch. 3-11-8; several sections of Ind. Code art. 3-11.7;

[1] Defendants' Motion for Oral Argument (Dkt. # 114) is denied as moot in light of this entry.

and Ind. Code § 9-24-16-10[2] (hereinafter collectively referred to as "SEA No. 483," the "Voter ID Law," or the "Law"). Plaintiffs contend that this law violates the First and Fourteenth Amendments of the United States Constitution as well as 42 U.S.C. § 1971, and Article 2, Sections 1 and 2 of the Indiana Constitution.

There are two groups of plaintiffs who have brought this consolidated action: The first group is comprised of the Indiana Democratic Party and the Marion County Democratic Central Committee (collectively the "Democrats"); the second group (the "ICLU Plaintiffs")[3] is comprised of two elected public officials, State Representative William Crawford and Trustee Joseph Simpson, and several nonprofit organizations: Concerned Clergy of Indianapolis ("CCI"), Indianapolis Resource Center for Independent Living ("IRCIL"), Indiana Coalition on Housing and Homeless Issues ("ICHHI"), Indianapolis Branch of the NAACP ("NAACP"), and United Senior Action of Indiana ("USA") (collectively the "Organization Plaintiffs"). There are also two sets of defendants in this case: the Marion County Election Board ("MCEB") and Todd Rokita, in his official capacity as Indiana Secretary of State, J. Bradley King and Kristi Robertson, in their official capacities as Co-Directors of the Indiana Election Division. In addition, the Indiana Attorney General has

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[2] Related matters were also passed by the Indiana General Assembly in Senate Enrolled Act No. 15, §§ 14, 16, and 17, codified at Ind. Code § 3-11-10-26; House Enrolled Act 1407, §§ 56, 142 and 143, codified at Ind. Code §§ 9-16-1-7; 9-16-4-1; and 3-11.7-5-1.

[3] We have coined this group the "ICLU Plaintiffs" because State Representative William Crawford, Trustee Joseph Simpson and the "Organization Plaintiffs" are all represented by the ICLU.

intervened in the case on behalf of the State of Indiana to defend the constitutionality of SEA 483.

This litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts. Plaintiffs (with one possible exception) became engaged in this dispute while it was still being debated by the Indiana General Assembly[4] and, in moving to this judicial forum, in many respects they have failed to adapt their arguments to the legal arena. Plaintiffs, for example, have not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements. Plaintiffs also have repeatedly advanced novel, sweeping political arguments which, if adopted, would require the invalidation, not only of SEA 483, but of other significant portions of Indiana's election code which have previously passed constitutional muster and/or to which Plaintiffs do not actually object; indeed, they offer them as preferable alternatives to the new Voter ID Law. In so doing, Plaintiffs' case is based on the implied assumption that the Court should give these Constitutional and statutory provisions an expansive review based

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[4] Representatives from CCI, ICHHI, IRCIL, NAACP, and USA all lobbied against the passage of SEA 483 and/or testified in opposition to it before the Indiana General Assembly. *See* ICLU's Brief in Supp. at 26-27; Reinke Dep. at 17; Niemier Dep. at 15; Madill Dep. at 11. USA also ran articles voicing its concerns about SEA 483. Trustee Simpson may be the only named plaintiff who did not formally take part in the dispute over SEA 483 while it was pending before the Indiana General Assembly, although even he did contact the ICLU "about midway through the [legislative] process" to express his interest in being a plaintiff in a lawsuit if SEA 483 were to pass. Simpson Dep. at 11.

on little more than their own personal and political preferences.[5]

Plaintiffs have mounted a facial challenge to the validity of SEA 483, raising a variety of related issues about the Voter ID Law, including that it substantially burdens the fundamental right to vote, impermissibly discriminates between and among different classes of voters, disproportionately affects disadvantaged voters, is unconstitutionally vague, imposes a new and material requirement for voting, and was not justified by existing circumstances or evidence. Defendants deny all of these criticisms, defending the enactment of SEA 483 as being justified by legitimate legislative concern for in-person voting fraud and a reasonable exercise of the State's constitutional power to regulate the time, place, and manner of elections. Defendants also claim that Plaintiffs lack standing to bring this attack on the statute, and that, in any event, the Secretary of State and the Co-Directors

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[5] We find ourselves constrained, in responding to Plaintiffs' broad-based challenge, by the following admonition of Chief Judge Kozinski, who wrote:

> It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. . . . Expanding some [provisions] to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.

Silveira v. Lockyer, 328 F.3d 567, 568-69 (9th Cir. 2003) (C.J. Kozinski dissenting).

of the Indiana Election Division are not proper defendants in this action.[6]

For the reasons elaborated below, we hold that SEA 483 is a constitutionally-valid, reasonable time, place, and manner restriction on voting and on voters and, therefore, we *GRANT* Defendants' Motions for Summary Judgment and *DENY* Plaintiffs' Motions for Summary Judgment.

Factual Background

The parties agree that there are no material facts in dispute that preclude summary judgment of this case. Even so, they have filed a total of eight summary judgment briefs, incorporating in excess of ninety pages of material facts not in dispute. In an effort to bring clarity to this deluge of data, we have grouped the facts into the following seven categories: (I) Indiana election law and

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[6] We pause at the outset to remark that our task in ruling on the complicated issues in this case has been impeded, not so much by the expansive scope of the litigation as by the haphazard, "shot gun" approach utilized by the attorneys in raising these difficult issues and then leaving them unsupported by evidence or controlling legal precedent. The briefing was fraught with inaccurate citations to the record, mischaracterized evidence in the record, and misrepresented holdings in the case law. Particularly troublesome was the fact that the two sets of plaintiffs consistently spoke independently of one another often raising the same argument but in slightly different fashion and without informing the court whether they were adopting or incorporating the claims of their co-plaintiffs. Plaintiffs also made no apparent effort to match individual plaintiffs to specific claims or arguments. What the court faced, as a result, was the gargantuan task of sorting through the hodge-podge of individual plaintiffs, their claims, and their evidence and then trying to make sense of it all. To require the Court to sort everything out and make legal sense of it, is a dereliction of counsels' responsibilities and an abuse of the court's scarce resources. None-the-less, we have done the best we can under the circumstances.

procedures, (II) Requirements for obtaining photo identification documents from the BMV, (III) Evidence regarding voter fraud, (IV) Evidence about potential impacts of SEA 483 on Indiana voters, (V) the Defendants, (VI) the Plaintiffs, and (VII) the Report submitted by the Democrats' expert, Kimball W. Brace (the "Brace Report"). There being no need to recount the voluminous facts marshaled by the parties, we have distilled and summarized the relevant facts by topic in the following section.

I. Indiana Election Law and Procedures.

There are certain aspects of Indiana election law and procedure which are relevant to this case, including: (A) Indiana constitutional provisions; (B) composition and responsibility of the precinct election board; (C) the responsibilities of the State Election Division; (D) the requirements of SEA 483; (E) the requirements and procedures for voting by absentee ballot; and (F) Indiana election law prior to enactment of SEA 483. Each aspect is addressed below.

A. *Constitutional Provisions.*

Article I, section four of the United States Constitution empowers the States to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congressional oversight. U.S. Const., art I, § 4, cl. 1.

The Indiana Constitution, Art. 2, § 2 sets out the basic requirements for voting in Indiana:

> (a) A citizen of the United States, who is at least eighteen (18) years of age and who has been

> a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.
>
> (b) A citizen may not be disenfranchised under subsection (a), if the citizen is entitled to vote in a precinct under subsection (c) or federal law.
>
> (c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before an election may vote in a precinct where the citizen previously resided if, on the date of the election, the citizen's name appears on the registration rolls for the precinct.

Indiana Constitution, Art. 2 § 14 allows the Indiana General Assembly to provide for registration of persons otherwise entitled to vote. Pursuant to Indiana Code §§ 3-7-13-1 through 3-7-24-17, and the National Voter Registration Act, 42 U.S.C. § 1973gg, there are a host of ways individuals may register to vote at various venues and offices including registering by mail. There is no requirement that identification be shown when one is registering in-person to vote. Deposition of Marion County Clerk Doris Ann Sadler ("Sadler Dep.") at 8-9. The registration form is signed under penalties of perjury. *Id.* at 9. There is also no requirement that an individual who is registering to vote by mail provide identification. *See* Ind. Code § 3-7-22-1, et seq.

B. *Precinct Election Board.*

At polling places on election day, there are five local election officials present: an inspector, appointed by the political party whose candidate for Secretary of State received the most votes in the last election in the county; two clerks, one from each major party, who are in charge of

the poll book and who check voters in and issue the ballots; and, two judges, one from each major party, who administer the voting machine. Sadler Dep. at 10-11. Each County Election Board appoints these officials. Ind. Code §§ 3-6-6-1, 2. The inspector and the judges jointly comprise the precinct election or poll board that resolves disputes that arise during the polling process. Indiana Code § 3-6-6-1; Sadler Dep. at 11.

C. *Indiana Election Division.*

The Indiana Election Division provides advice and instruction to county election officials and publishes information and forms for use in Indiana elections. *See* Ind. Code § 3-6-4.2-1, et seq.; Deposition of Co-Director J. Bradley King, Attachment 2 ("King Dep.") at 7. The Division has no direct role in enforcing election laws, nor does the Secretary of State. However, in providing advice and instruction to county election officials, the Election Division, in conjunction with the Secretary of State, has instituted several programs to educate both voters and poll workers about the requirements of SEA 483.[7] The Election Division's manuals and training, however, are advisory only, as the administration of any election and its oversight is the responsibility of the County Election Board. Ind. Code § 3-6-15-14; Sadler Dep. at 6. County Election Boards can take, and have taken, positions about election laws and procedures contrary to the position

[7] The Election Division has published a 2006 Indiana Voter Information Guide, which summarizes the Voter ID Law, (*see* State's Ex. 45), and agents of the Secretary of State's Office plan to educate voters and poll workers about SEA 483 utilizing some $4 million in Federal HAVA grants. State's Ex. 46 ("Fanger Aff.") at ¶¶ 11-13.

advanced by the State Election Division. *See, e.g.*, Sadler Dep. at 52.

D. *Requirements of SEA 483.*

The Voter ID Law requires citizens voting in-person at precinct polling places on election day, or casting an absentee ballot in person at a county clerk's office prior to election day, to present election officials with some form of valid photo identification, issued by the United States or the State of Indiana. Ind. Code § 3-11-8-25.1. This photo identification card must contain the following information and meet the following conditions:

(1) A photograph of the individual to whom the "proof of identification" was issued;

(2) The name of the individual to whom the document was issued, which "conforms to the name in the individual's voter registration record";

(3) An expiration date;

(4) The identification must be current or have expired after the date of the most recent general election; and

(5) The "proof of identification" must have been "issued by the United States or the state of Indiana."

Ind. Code § 3-5-2-40.5.

Pursuant to SEA 483, Indiana voters are required to produce acceptable photo identification before signing the poll book. Ind. Code § 3-11-8-25.1(c). SEA 483 applies to voting at both primary and general elections. Ind. Code

§§ 3-10-1-7.2; 3-11-8-25.1. SEA 483 does not apply, however, to receiving and to casting an absentee ballot sent by the county to the voter through the U.S. mail (hereinafter the "absentee ballot exception" or the "absentee exception"); or to "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides" (hereinafter the "nursing home exception"). Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(f); 3-11-10-1.2. If a voter falls within either of these exceptions, the voter is not required to provide any proof of identification in order to vote in-person and to have his vote counted. King Dep. at 98-99; Robertson Dep. at 36.

If a voter does not produce acceptable photo identification at the polls, a member of the precinct election board "shall challenge the voter." Ind. Code § 3-11-8-25.1(d)(2).[8] If so challenged, the voter may sign an affidavit attesting to the voter's right to vote in that precinct, whereupon the voter may then sign the poll book and cast a provisional ballot. Ind. Code § 3-11-8-25.1(e). In order to have the provisional ballot counted, the voter who is challenged for failure to provide acceptable photo identification and casts a provisional ballot must appear before the circuit court clerk or the county election board by noon on the second Monday following the election to prove the voter's identity. Ind. Code § 3-11-7.5-2.5(a). If at that point the voter provides acceptable photo identification and executes an affidavit that the voter is the same individual who cast the provisional ballot on election day, then the voter's provisional ballot will be opened, processed, and counted so long

[8] A member of the precinct election board may be subject to criminal prosecution for knowingly failing to comply with SEA 483's provisions. King Dep. at 58; Ind. Code § 3-14-2-14.

as there are no other non-identification challenges. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

The provisional ballot of a voter who is challenged for failing to show acceptable photo identification at the polls on election day may also be opened and processed if, by noon on the second Monday following election day, the voter appears before the county clerk of courts or the county election board and executes an affidavit that the person is the same as the person who cast the provisional ballot and either (1) the person is indigent and is "unable to obtain proof of identification without payment of a fee" (hereinafter the "indigent exception" or the "indigency exception"); or (2) has a religious objection to being photographed. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c). The indigency and religious objection affidavits are not available for voters to sign at the polls; they are available only at election board offices after Election Day. King Dep. at 73; Robertson Dep. at 37.

If, notwithstanding a voter's attempt to validate a provisional ballot using one of these methods, the election board determines that the voter's provisional ballot is not valid, the voter may file a petition for judicial review in the local Superior or Circuit court.[9] Ultimately, therefore, the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Indiana Supreme Court.

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[9] Defendants contend, therefore, that "the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Indiana Supreme Court." MCEB's Brief in Supp. at 4-5.

E. *Voting by Absentee Ballot.*

"A voter who wants to vote by absentee ballot must apply to the county election board for an official absentee ballot." Ind. Code § 3-11-4-2. The absentee ballot application must be received by the circuit court clerk no earlier than ninety (90) days before election day and no later than the date between midnight on the eighth day before election day or noon on election day, depending on how the voter registered to vote, how the application is delivered, and how the absentee ballot is requested to be delivered. Ind. Code § 3-11-4-3.[10]

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[10] When an absentee vote is cast, the voter must seal the ballot and sign his or her name on the outside of the envelope containing the ballot and complete an affidavit printed on the envelope. Sadler Dep. at 24; Ind. Code § 3-11-4-21 (prescribing the form of the affidavit). Before the absentee ballot is counted, the county election board or its designates examine the signature and, if it does not match, it can be challenged. The precinct election board of the precinct where the voter lives will determine if the challenged ballot will be counted or not. Sadler Dep. at 24-26. The signature comparison permits election officials to ensure that there is no fraud and that the election is both safe and secure. King Dep. at 126. There is no requirement that individuals voting via absentee ballot produce identification, except that, if a voter registers to vote by mail and votes for the first time thereafter in a federal election, the voter must present certain identification, as required by the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252, 42 U.S.C. § 15483(b).

Under Indiana law, a voter who satisfies any of the following is entitled to vote absentee:

(1) The voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open;

(2) The voter will be absent from the precinct of the voter's residence on election day because of election day service (i.e. as a precinct election officer, a watcher, a challenger, a pollbook holder, or a person employed by the election board to administer absentee ballots);

(Continued on following page)

F. *Indiana Election Law Prior to SEA 483.*

Under prior Indiana law, a voter seeking to vote in-person at a polling place would be required to present himself or herself to the clerks and sign the poll book. Sadler Dep. at 11; King Dep. at 28. There was no requirement that a voter show any form of identification in order to vote after the prospective voter signed in with the clerk. Sadler Dep. at 11.[11] At that point, there would generally be a photographic copy of the signature that would be compared. Sadler Dep. at 11. Any member of precinct election

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(3) The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during the entire twelve (12) hours that the polls are open.

(4) The voter is a voter with disabilities.

(5) The voter is an elderly voter.

(6) The voter is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury during the entire twelve (12) hours that the polls are open.

(7) The voter is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open.

(8) The voter is eligible to vote under IC 3-10-11 or IC 3-10-12 (governing procedures for voters who have changed their precinct of residence prior to election day).

(9) The voter is prevented from voting due to observance of a religious discipline or religious holiday during the entire twelve (12) hours that the polls are open.

(10) The voter is an address confidentiality program participant.

Ind. Code § 3-11-10-24.

[11] As mentioned in footnote 10, *supra*, a limited class of voters were already required to present some form of identification pursuant to HAVA.

boards (the inspector and two judges) could challenge a voter suspected of misrepresenting his identity for voting purposes, as could political party challengers. *See* King Dep. at 44, 46, 89. Either political party's clerk could also challenge a voter based on a comparison of the voter's signature to the signature contained in the voter registration records. King Dep. at 44. A voter who misrepresented his identity for purposes of casting a fraudulent ballot is now and has for decades been subject to a felony charge and conviction. Ind. Code § 3-14-2-16; King Dep. at 32.

Prior to 2004, Indiana law did not provide for the casting of a "provisional" ballot. Instead, a member of the precinct election board, or the election clerk, who wished to challenge the eligibility of a voter would be required to swear out an affidavit under the penalties of perjury. *See* King Dep. at 49, Ex. 2. The challenged voter could then swear out a counter-affidavit which had to contain the following information under the penalties of perjury: (1) the voter's name, (2) date of birth, (3) present address, (4) prior address (if applicable), (5) that the voter is a citizen, (6) that the voter has resided in the precinct for at least 30 days, and (7) that the voter has not already voted in any other precinct. *See* King Dep. at 50-51; Ex. 2; Ind. Code § 3-11-8-23. The voter would then be permitted to vote using a regular ballot after signing the poll book. King Dep at 49. The challenging affidavits were required to be sent to the prosecuting attorney for investigation. King Dep. at 49, 56-57; Ind. Code §§ 3-14-5-2 and 3.[12]

[12] There appears to be an ongoing dispute as to whether a voter challenged under the prior law had to vote by provisional ballot. *See* King Dep. at 53-54; Sadler Dep. at 13, 52; Robertson Dep. at 20-22.

In 2004, following the passage and implementation of the Help America Vote Act of 2002 ("HAVA"), Public Law 107-252, provisional voting for the first time became an available option. Provisional ballots are reviewed by the county election board following election day to determine whether they should be counted. Ind. Code § 3-11.7-5-2.

In the 2004 general election, 82% of the provisional ballots cast in Marion County were not counted. Statewide, only about 15% of all provisional ballots were counted. Marion County Clerk Doris Ann Sadler, by affidavit, explained that the primary reasons for provisional ballots were: first, because of "poll worker or voter error in filling out the paperwork;" second, because the person "simply was not registered to vote;" and, third, "a person was in the wrong polling place in the wrong precinct and insisted . . . on voting a provisional ballot in that precinct." Sadler Dep. at 15-17, 20, 44.

In her deposition, Clerk Sadler also attested to the fact that challenges can take up to one-half (1/2) hour to resolve, especially if lines at the polls are long. Sadler Dep. 19. When asked whether she believed the new requirements imposed on voters and precinct board workers by SEA 483 would slow down the voting process, Clerk Sadler opined that she did not think so, "unless there's a huge challenge effort made by either of the [political] parties, which is typically where those challenges are generated." Sadler Dep. at 48-49. Sadler agreed that the opportunities for presenting challenges has increased as a result of the photo identification requirements of SEA 483.

II. Requirements for Obtaining Photo Identification Documents.

As indicated above, in order to vote in person, Indiana voters who do not reside in nursing homes, must present a current photo identification, with an expiration date, issued by the State or federal government. The federally issued identification includes passports as well as military identification. King Dep. at 60. State identification could for example, include university-issued identification cards, if the cards contain an expiration date. King Dep. at 61. The parties agree that the most likely source of acceptable identification is either drivers' licenses or identification cards issued by the Indiana Bureau of Motor Vehicles ("BMV"); indeed, the text of SEA 483 focuses on identification cards issued by the BMV. *See,* SEA 483 §§ 15-18. We therefore begin by reviewing the requirements for obtaining such photo identification from the BMV, and then examine the tangential requirements for obtaining an Indiana birth certificate.

A. *Obtaining Photo Identification from the BMV.*

In order to obtain a driver's license or identification card from the BMV, an applicant must personally visit a BMV branch office[13] and produce certain forms of identification.[14] BMV rules require that a first-time Indiana

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[13] The General Assembly passed a law in 2005 prohibiting Internet renewal of driver's licenses. All individuals are now required to appear at a license branch to renew their licenses. HEA 1073 (2005), codified at Ind. Code § 29-24-12-5.

[14] The parties note that in August 2005, the Indiana Court of Appeals held that the identification requirements imposed by the BMV are invalid because they had not been properly promulgated as administrative rules. *See Villegas v. Silverman,* 832 N.E.2d 598, 610

(Continued on following page)

driver's license or non-license identification-card applicant[15] present, among other things, either: one primary document, one secondary document, and one proof of Indiana residency requirement or two primary documents and one proof of Indiana residency.[16] Deposition of BMV Designee Carol Redman ("Redman Dep.") at 5, Ex. 2. The requirements for obtaining each of these documents are laid out below, as well as some of the difficulties in obtaining photo identification which have been identified by Plaintiffs.

1. *Primary Document.*

A primary document used to verify identity, date of birth, and citizenship, may include a United States Birth Certificate with a stamp or seal, documents showing that the person was born abroad as an American citizen or is a naturalized citizen, a passport, or a U.S. military or

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(Ind. Ct. App. 2005). The BMV is seeking discretionary review by the Supreme Court. The Court of Appeals has not yet certified its decision in *Villegas* and the BMV continues to enforce its documentation policy because it has not yet been enjoined from doing so. *See* Ind. R. App. Pro. 65(E). The BMV has also undertaken the process of formally promulgating administrative rules, requiring driver's license and identification-card applicants to present specified documents to the BMV. After a public comment period, the rules are expected to be finalized in 2006. The contours of this collateral dispute, however, are beyond the scope of the case at hand.

[15] In addition, if the applicant does not have a current license or identification card, or the license or card has been expired for over ten years, an applicant must present documentation as a first-time applicant. *See* Ind. Reg. 64 (140 IAC 7-4-2(f)(1), (3)).

[16] A first-time license applicant must also provide the BMV with proof of a valid Social Security number. *See* Ind. Reg. 64 (140 IAC 7-4-2(b)(1)).

merchant marine photo identification. Redman Dep. Ex. 2 ("BMV Identification Document List").

2. *Secondary Document.*

Secondary documents are currently defined as:

- Bank Statement
- Certified Academic Transcript
- Confirmation of Registration Letter from an Educational Institution
- Court Documentation with Stamp or Seal
- Foreign Consulate-Issued ID Card
- Government-Issued License or ID Card
- Hoosier RX Plan Card [with] imprinted name
- Hoosier Works Card [with] imprinted name
- Indiana County Pre-sentence Investigation Report with clerk stamp or seal
- Indiana gun permit (Valid)
- Indiana probation photo ID card
- Indiana professional/occupational license (Valid)
- Indiana BMV Title Application [with] BMV valid stamp
- Indiana BMV Title or Registration (Valid)
- Insurance Card

- Letter from Probation Officer or Government Caseworker on letterhead stationary, certified with court or government stamp or seal with the applicant's name, and signature of the probation officer or caseworker
- Major Credit or Bank Card (MC, VISA, AE, and Discover ONLY) (valid)
- Original Out-of-State Driving Record
- Out-of-State Driver License, Identification Card or Permit with photograph
- Pay Check Stub-Computer generated
- Prison Release Documentation/Photo ID
- School Report Card (dated within 12 mos.)
- School Photo ID Card
- Selective Service Acknowledgment Card – SSS Form 3A
- U.S. Divorce Decree certified by court of law with stamp or seal
- U.S. Application of Marriage/Record of Marriage (Certified copy). Must contain the stamped seal and be signed by clerk.
- U.S. District Court Pre-Sentence Investigation Report with clerk stamp or seal
- U.S. Military Discharge or DD214 Separation papers
- U.S. Veterans Universal Access ID card with photo
- W-2 Form (Federal or State) of 1099 Federal tax form.
- BMV Identification Document List

3. *Proof of Indiana Residency Document.*

The proof of Indiana residency requires that an applicant present some proof of a residential address, although a post office box is not acceptable. Redman Dep. Ex. 2. Proof of residency documents include any primary or secondary document that contains the applicant's name and residential address as well as documents including, but not limited to:

- Child Support Check from the [Family and Social Services Administration] with name and address of the applicant attached
- Change of Address Confirmation form (CNL 107) from U.S. Postal Service listing old and new address
- CURRENT Bill or Benefit Statement (within 60 days of issuance)
- Indiana Driver's License, Identification Card or Permit with Photograph
- Indiana Property Deed or Tax Assessment
- Indiana Residency Affidavit
- Voter Registration Card

BMV Identification Document List.[17]

In order to obtain an identification card or license from the BMV, an applicant must personally appear at the branch. Redman Dep. at 8. An identification card costs $10 and a driver's license costs $14. The identification is valid

[17] The proposed amended rule adds two additional documents to prove Indiana residency – a valid Indiana vehicle title or water craft registration. Redman Dep. at 6.

for four years. Redman Dep. at 13. As of January 1, 2006, a driver's license expires after six years. *See* Ind. Code § 9-234-12-1(c). SEA 483 provides that an individual who does not have a valid driver's license and will be at least eighteen (18) years of age at the next general, municipal, or special election must be issued an identification card from the BMV without cost. Ind. Code § 9-24-16-10; Affidavit of BMV Assistant Commissioner Stephen Leak at ¶¶ 8-11.

4. *Potential Difficulties in Obtaining Photo Identification from the BMV.*

The BMV is aware that there are persons who do not currently have a driver's license or identification card and who are, or who will be, eligible to vote at the next election. Redman Dep. at 21-22. The BMV, however, has not been able to determine the approximate number of Indiana residents of voting age who are without an Indiana driver's license or identification card. *See* Redman Dep. at 22-30. The BMV is also apparently aware of persons who have tried to obtain a driver's license or identification card and have been turned away because they do not have an original birth certificate or because they do not have the required secondary documentation or proof of Indiana residency. Redman Dep. at 18.[18]

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[18] For example, Lafayette Urban Ministries, an organization that provides assistance to needy families, assisted approximately 150 individuals in 2004 in an effort to obtain photo identification cards. Affidavit of Mary M. Anderson ("Anderson Aff.") at ¶¶ 2-5. About half of these individuals failed to obtain identification cards, allegedly because they did not have photo identification to obtain a birth certificate. Anderson Aff. ¶¶ 2-5. It is unclear if these individuals attempted to obtain a birth certificate from the Indiana Department of Health, which allows for nonphotographic forms of identification, *see infra* note 20 and

(Continued on following page)

Plaintiffs contend that obtaining photo identification from the BMV can be a difficult and frustrating process. For example, we were told of one Theresa Clemente, a 78-year-old woman residing in Fort Wayne but originally from Massachusetts, who recently attempted to obtain a photo ID from the BMV so she could vote in Indiana. Clemente Aff. ¶¶ 1-8. After three separate visits to the BMV over a period of many weeks and obtaining a certified copy of her birth certificate, the BMV still refused to issue her photographic identification purportedly on the grounds that her birth certificate contains only her maiden name. Clemente Aff. ¶¶ 1-8.

Plaintiffs also note that the BMV has recently closed numerous branches throughout the State, thereby increasing travel costs for some individuals in order to reach a branch. *See* Redmond Dep. 34.

B. *Requirements for obtaining an Indiana birth certificate.*

A citizen born in Indiana who needs to obtain a birth certificate as a primary document for obtaining a license or non-license photo-identification card may obtain a birth certificate from either the Indiana Department of Health ("IDOH") or the Department of Health of the county of birth. *See* State's Exs. 48, 49. By virtue of a statutory amendment in 2003, the IDOH must charge a fee of $10.00 for conducting a birth-certificate search. Ind. Code §§ 16-37-1-11; 16-37-1-11.5. Local health departments establish

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accompanying text, or a county health department and, if the latter, what the required forms of identification were.

and collect fees for records which are not to exceed the cost of the services provided. Ind. Code § 16-20-1-27. Fees vary among county departments of health from $2.00 to $10.00. *See* State's Ex. 49.[19] In its "frequently-asked questions" publication, the IDOH states that applicants may present a combination of non-photo identification documents to obtain a birth certificate, including a Social Security card, a credit card, a bank card, a motor vehicle registration, a housing lease, a military identification, an Indiana professional license, an original employment application, and a voter registration card. *See* http://www.in.gov/isdh/bdcertifs/faq.htm#VitalFAQ6.[20]

III. Voter Fraud.

The parties have submitted evidence that paints contrasting pictures concerning whether in-person voter fraud is or should be a concern in Indiana. The arguments concerning voter fraud tend to unfold as follows: (A) Plaintiffs note that there is no evidence of any instance of in-person voter fraud in Indiana; (B) Defendants counter that, even though there is no evidence of voter fraud as such, there is significant inflation in the Indiana voter registration lists; and in any event, based on reports documenting cases of in-person voter from other states, (C)

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[19] For individuals born in other states, the cost may be more. For instance, the cost of obtaining a certified birth certificate from Boston, Massachusetts is $28. Clemente Aff. ¶ 5. *See also* Affidavit of Robert Andrew Ford ("Ford Aff.") at ¶ 9 (noting the fee to obtain a birth certificate in California, Michigan, New York, and Oregon).

[20] The State has cited to this page as an exhibit in their briefs; however, we are unable to find it anywhere in the record.

Defendants maintain that voter fraud is or should be a concern in Indiana.

A. *No Documentation of Instances of In-Person Voter Fraud in Indiana.*

Defendants concede that "the State of Indiana is not aware of any incidents or person attempting vote, or voting, at a voting place with fraudulent or otherwise false identification." ICLU Ex. 18 ("MCEB's Response to Interrogatories") at ¶ 2. Plaintiffs further note that no voter in Indiana history has ever been formally charged with any sort of crime related to impersonating someone else for purposes of voting. King Dep. at 95. Plaintiffs submitted testimony from several veteran poll watchers who confirmed they have never seen any instances of attempted in-person voter fraud in Indiana. *See* Haith Aff. at ¶ 17; Crawford Dep. at 45 and Ex. B at 10; Bohannan Dep. Ex. H at 12. Plaintiffs further contend that no evidence of in-person voting fraud was presented to the Indiana General Assembly during the legislative process leading up to the enactment of SEA 483. *See* Mahern Aff. ¶¶ 2-3. Plaintiffs do note, however, there is evidence of absentee voter fraud in Indiana and that pervasive fraud regarding absentee balloting led the Indiana Supreme Court recently to vacate the results of the mayoral election in East Chicago. *See Pabey v. Pastrick,* 816 N.E.2d 1138 (Ind. 2004).

B. *Inflation of Indiana's Voter Registration Rolls.*

Defendants submitted evidence that Indiana's voter registration rolls are significantly inflated. Defendants hired Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population

data, who conducted an examination of Indiana's voter registration lists and concluded that they are among the most highly inflated in the nation. State's Ex. 27 ("Benson Report") at 9. Specifically, when Benson compared actual voter registration with self-reported registration rates, he found that there were 4.3 million registered voters in 2004, while there were only 3 million residents who reported being registered, resulting in estimated inflation of 41.4%. Benson noted Indiana had the largest discrepancy in the nation between official registration numbers and self-reported rate of registration. Benson Report at 6. Benson also reported, with a high rate of confidence, that he found at least 35,699 Indiana registered voters who are now deceased. Benson Report at 8.[21] Additionally, his research indicated that in 2004 there were 233,519 potential duplicate voter registrations. Benson Report at 9.

C. *National Reports of In-Person Voter Fraud.*

The State has also produced evidence of published books and media reports discussing allegations and instances of in-person voter fraud in several other states. *See* Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 292 (1996) (noting that documentation of in-person voter fraud often occurs only when a legitimate voter at the polls hears a fraudulent voter trying to use her name, as happened to a woman in California in 1994); John Fund, *Stealing Elections* 64 (2004) (noting in the St. Louis fourteen dead people "voted" in the 2000); State's Ex. 2, p. 23 (describing recent U.S. Department of Justice investigations into

[21] The Defendants also note that, in 2000, the Indianapolis Star investigated the accuracy of Indiana's voter rolls and found that more than 300 dead people were registered. State's Ex. 25, p. 3.

election fraud, which, as of August 2005, had resulted in 52 convictions); State's Ex. 3, pp. 4-5, 19 (court findings that in the State of Washington's 2004 gubernatorial elections more than 1,600 fraudulently cast ballots, including 19 ballots cast by dead voters, six double votes, and 77 votes unaccounted for on the registration rolls); State's Ex. 4, pp. 2-4 (joint task force findings describing instances in the 2004 elections in Wisconsin where individuals voted twice by using fake names and addresses and citizens who told investigators that they did not vote, even though the report showed that someone voted in their names); State's Ex. 6, pp. 42-43 and State's Ex. 7, pp. 3-6 (describing an investigation by the Missouri Secretary of State after the 2000 elections of two of counties which revealed over 1,000 fraudulent ballots, including at least 68 multiple votes, 14 dead person votes, and 79 vacant-lot voters, with another 200 sites requesting further review); State's Ex. 10, pp. 1-2 (newspaper reports that dozens, possibly hundreds, of people who lived outside the city limits illegally cast votes at the polls in Miami's mayoral elections in 1997); State's Ex. 11, p. 1-2 (Johns Hopkins University study which found that in Maryland at least 63 votes were cast in the name of deceased individuals between the 1980's and 2004). The State has produced newspaper reports recounting that in recent elections votes were cast in the names of dead people in Georgia, Illinois, and Pennsylvania. *See* State's Exs. 12-14, 18. The report from the Commission on Federal Election Reform (known as the Baker-Carter Commission) recently concluded that "there is no doubt that [in-person voter fraud] occurs." State's Ex. 1, p. 18.[22]

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[22] Although the Baker-Carter report was released after SEA 483 was enacted, the report's conclusions substantiate the myriad of news reports of in-person voter fraud predating the passage of SEA 483.

D. *The Impact of the Perception of Voter Fraud on the Confidence of the Electorate.*

The State submitted several polls indicating voter concern about election fraud and support for photo identification requirements at the polls. For example, prior to the 2000 election, a Rasmussen Reports poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. State's Ex. 22, p. 1. Similarly, a Gallup Poll showed that, after the 2000 election, 67% of adults nationally had only "some" or "very little" confidence in the way the votes are cast in our country. State's Ex. 23, pp. 8-9. A 2004 Zogby Poll found that 10% of voters believe that their votes are not counted accurately (John Fund, *Stealing Elections* 2 (2004)), and according to election-law scholar Richard Hasen, more than 13.6% of Americans worried that the 2004 presidential vote was unfair. State's Ex. 24, p. 1. A Rasmussen Reports 2004 survey of 1000 likely voters, indicated that 82% of respondents (including 89% of Bush supporters and 75% of Kerry supporters) favored photo identification at the polls. *See* Fund at 5. Adding weight to these findings, the Baker-Carter Commission recently concluded that, based on its studies, the perception of fraud, "contributes to low confidence in the system." State's Ex. 1, p. 19.

IV. Impact of SEA 483 on Voters.

The parties again paint contrasting pictures regarding the impact of SEA 483 on Indiana voters. Defendants submitted evidence of the impact of SEA 483 when it was enforced in three municipal elections in 2005. Plaintiffs submitted evidence and testimony concerning the potential negative impacts of SEA 483 on various groups of disadvantaged voters in Indiana.

A. *Enforcement of SEA 483 in Municipal Elections.*

On November 8, 2005, three municipalities enforced SEA 483 at contested local elections. *See* State's Ex. 47 ("Bauler Aff.") Ex. C. Unscientific exit polling data showed that of the 105 respondents, 21 voters learned about the Voter ID Law listening to the radio, 12 from watching television, 23 from direct mailings, and almost half, (49), had read about the law in the newspaper. In all, 83% of those surveyed were aware of the Voter ID Law before arriving at the polling place. Bauer Aff. Ex. C at 2. Also, in both of the towns holding regular off-year elections, the number of votes cast increased over the prior election. Bauer Aff. Ex. C at 3 (noting Cambridge City's number of votes cast increased 10% over 2001 and Montezuma saw an increase of 98% over 2001).

B. *Potential Negative Impacts of SEA 483.*

Plaintiffs identify several groups they claim will be particularly disadvantaged by the photo identification requirements of SEA 483, including homeless, low-income, elderly, disabled, and minority individuals.

Professor Marjorie Hershey of Indiana University submitted a report which states because SEA 483 increases the costs of voting through the imposition of additional requirements and barriers, it is likely to decrease voter turnout, particularly among voters of lower socio-economic status. Hershey Report at 12-17. Prof. Hershey contends that the costs imposed by SEA 483, in terms of time, transportation, fees and obtaining all of the necessary information, threaten to be most difficult for the disabled, homeless, persons with limited income, those

without cars, people of color, those who are part of "language minorities," and the elderly. Hershey Report at 17.

Plaintiffs cite a number of informal and formal surveys which tend to support Hearshey's conclusions. Plaintiffs note a survey conducted by plaintiff Indiana Coalition on Housing and Homeless Issues ("ICHHI") of its members, providers of services to homeless and low-income persons, in which providers of services responded that they were aware of clients who had neither licenses nor identification cards. Deposition of Michael Reinke, ("Reinke Dep.") at 60-67, Ex. I; State's Ex. 69 ("ICHHI Survey Responses").[23] In this same vein, Brenda Thompson and Robert Andrew Ford, case managers at Horizon House,[24] a day center in Indianapolis for homeless persons, testified concerning the hardships they believe SEA 483 will impose on homeless individuals, noting, for example, that homeless persons often have lost all their possessions, including any identification. Ford Aff. at ¶¶ 1-5; Thompson Aff. at ¶¶ 1-5. Thompson also testified that, in her experience, homeless individuals frequently walk everywhere they go. Thus, according to Thompson:

> (E)ven if they present themselves to vote and are challenged under the new identification law and are informed that in order for their ballot to count they must go get identification and then go to the Clerk's office, or even if they were to be

[23] Question Four of the survey asks, "Are you personally aware that many homeless persons do not have current drivers license?" and Question Five of the survey asks, "Are you personally aware that many homeless persons do not have current identification cards?" ICHHI Survey Responses.

[24] Horizon House is a member of ICHHI, one of the Organization Plaintiffs in this case. *See* Affidavit of Michael Reinke.

> told that they just had to go to the Clerk's office, homeless persons probably will not do so because of transportation difficulties.

Thompson Aff. at ¶¶ 16-17. Ford noted that, in his experience, it is "quite likely that a homeless person who is faced with a challenge to his or her ability to vote will not pursue his or her right to vote but will leave the poll rather than face a situation of confrontation. . . . [A]nything which makes voting more difficult will probably deter many, if not most, homeless persons from voting." Ford ¶¶ 17, 19.

Plaintiffs further note that a survey released on October 28, 2005 by AARP Indiana reports that 3% of Indiana registered voters over the age of 60 do not have a drivers license or identification card. *See* Affidavit of June Lyle and attached AARP Indiana survey. Similarly, the director of plaintiff United Senior Action of Indiana ("USA") concludes, based on her experience with the organization and the conversations she has had over the last 16 years with her members, that there are many senior citizens who do not have either a valid license or identification card. Deposition of Michelle Niemier ("Niemier Dep.") at 23-24.

The executive director of plaintiff Indianapolis Resource Center for Independent Living ("IRCIL") notes that it is very common for persons with disabilities not to have identification. Deposition of Melissa Madill ("Madill Dep.") at 13. IRCIL further contends that persons who are blind or visually impaired often do not know that their identification cards, if they have them, have expired. Madill Dep. at 47.

Plaintiffs also submitted testimony from several poll workers or poll observers who testified that in the poor and minority community in the past, when a provisional ballot did not require additional efforts on the voters' part, prospective voters were extremely intimidated by challenges and frequently did not vote and just left the polls, even when the challenges were not meritorious. *See* Affidavit of Aaron E. Haith ("Haith Aff.") at ¶¶ 2-10; Deposition of Roderick E. Bohannan ("Bohannan Dep.") at 50-54; Deposition of Margie Oakley ("Oakley Dep.") at 20-21; Deposition of Joseph Simpson ("Simpson Dep.") at 62-64. According to poll observer Aaron Haith, frequently the potential voters who are being challenged are on their way to work or on their way home to take care of families and they do not want to take the 15-30 minutes to go through the challenge process in order to vote. Haith Aff. at ¶¶ 7, 11.[25]

V. The Plaintiffs

There are two groups of plaintiffs in this consolidated case. The first group is comprised of the Indiana Democratic Party and the Marion County Democratic Central Committee (together, the "Democrats"), and the second (the "ICLU Plaintiffs") is comprised of two elected public officials, State Representative William Crawford and Trustee Joseph Simpson, and several nonprofit organizations – Concerned Clergy of Indianapolis, Indianapolis Resource Center for Independent Living, Indiana Coalition

[25] The Democrats submitted an expert report from Kimball W. Brace (the "Brace Report") concerning the number of potential Indiana voters who do not already possess photo identification. His report is addressed separately in Factual Background Section, *infra*.

on Housing and Homeless Issues, Indianapolis Branch of the NAACP, and United Senior Action of Indiana (collectively the "Organization Plaintiffs").[26] The relevant facts about each group are as follows.

A. *The Democrats.*

According to their Second Amended Complaint, these two plaintiff groups are "political party organizations dedicated to electing candidates of the Democratic Party to public office in Marion County, and throughout Indiana, and with which are associated hundreds of thousands of registered voters who regularly support and vote for candidates who are affiliated with the Democratic Party." Democrats' Second Am. Compl. at ¶ 2. The Democrats claim that all voters who cast ballots for a Democratic Party hopeful in a primary election "associate[] themselves with the Democratic Party." State's Ex. 50 ("Indiana Democratic Party's Responses to Request for Production") at ¶ 2.

In response to whether it has any members, the Indiana Democratic Party observed that "[i]n Indiana, voters do not 'register' as members of a political party but express their allegiance to a political party by asking for that party's ballot at the primary election, attending party meetings or events, contributing to the party's candidates and casting votes for candidates in the general election, among other things." *See Id.* at ¶ 3. According to the Rules of the Indiana Democratic Party, "any legally qualified

[26] We have coined this group the "ICLU Plaintiffs" because State Representative William Crawford, Trustee Joseph Simpson and the "Organization Plaintiffs" are all represented by the ICLU.

Indiana voter who supports the purposes of the Party may be a member," *see* State's Ex. 52 ("Rules of the Indiana Democratic Party") at 2, but those rules do not otherwise state how such a voter voluntarily becomes a member or voluntarily ceases to be a member.

The Marion County Democratic Central Committee (MCDCC) is currently comprised of four members: Edward Treacy, Billie Breaux, Barbara Lawrence, and Tony Duncan. The MCDCC does not have bylaws or policies acknowledging the existence of any other members. State's Ex. 53 ("MCDCC Responses to Defendant's Interrogatories") at ¶ 2. Edward Treacy, the Chairperson of the Marion County Democratic Central Committee ("MCDCC"), has provided affidavit testimony that the Photo ID Law will require the MCDCC to divert its limited resources away from its primary activities, such as "get-out-the-vote" efforts and helping to elect its candidates to public office, into efforts to inform its voters of the Law's photo identification requirements and to ensure that it is not selectively enforced during the 2006 general election. Democrats' Ex. 23.

Regarding the identity of individuals "associated with the Democratic Party" who would allegedly be injured by the implementation of the Voter ID Law, the Democrats initially identified nine citizens: David Harrison, Constance Andrews, Barbara J. Smith, Imogene M. Chapman, Ernest L. Pruden, Helen L. Wright, Lois E. Holland, Ronald Yancey, and Bettie L. Weiss. Indiana Democratic Party's Responses to Request for Production at ¶ 8; MCDCC Responses to Defendant's Interrogatories at ¶ 8. In a supplemental filing, the Democrats identified three additional individuals associated with the Democratic Party who would allegedly be injured. Those individuals

are: Christina Bohlander, Thelma Ruth Hunter, and Corinne Collins. *See* State's Ex. 70 (collectively these twelve individuals are hereinafter referred to as the "Named Individuals"). The Democrats identified these allegedly injured citizens by examining responses to a post card survey of their Marion County poll workers. Indiana Democratic Party's Responses to Request for Production at ¶ 7. Unfortunately, Bettie Weiss has now died and no information was submitted to the Court concerning either Christina Bohlander or Corinne Collins. Following are the pertinent details concerning the remaining nine individuals:

1. *The Named Individuals.*

Constance Andrews is an employee of the Bureau of Motor Vehicles who frequently works at the polls on election day as a Judge for the Democratic Party. Andrews Dep. at 7, 13. Although Ms. Andrews declared in response to the Democrats' postcard survey that she did not have a driver's license or any other government-issued photo identification, at her deposition she testified that she did indeed have a valid driver's license. When asked why she responded as she did to the survey, she said "I may have made a mistake there." Andrews Dep. at 17-18.

Imogene Chapman is an 84-year-old woman who resides in Marion County and has worked at the polls for fifteen years. State's Ex. 57 ("Chapman Dep.") at 6-7, 10. She has no license or photo identification from either Indiana or the federal government. Ms. Chapman has previously voted absentee but said she did not like to. Ms. Chapman splits her ticket between the Democrats and other parties when she can. Ms. Chapman said she believes

SEA 483 "is an infringement of my Civil Rights to vote." Chapman Dep. at 6-7, 10, 13.

Theresa Clemente is 78 years old and, although now residing in Indiana, she previously lived in Boston. In her Affidavit, she described how, after paying $28.00 to obtain a certified copy of her birth certificate from the State of Massachusetts and making three trips to the BMV, she had still not received a photo ID. *See generally* Clemente Aff.

David Harrison, a Marion County resident, is a 75-year-old military veteran. State's Ex. 5 ("Harrison Dep.") at 7-8, 17. He is a registered voter but has neither a license nor identification card. He also does not have an original birth certificate or the money to secure a birth certificate, although he thinks a church might help him by giving him the money. He does not want to vote absentee because he does not trust that form of voting. Harrison Dep. at 12-16.

Lois Holland is 69 years of age and lives in Indianapolis. State's Ex. 59 ("Holland Dep.") at 4-5. She has no identification containing her photograph. The only birth certificate that she has is copied from the family Bible. She votes in both the primary and general elections. Holland Dep. at 13, 16, 19. Ms. Holland works at the polls as a clerk for the Democratic Party and, as a result, has voted absentee in the past. Holland Dep. at 9. Ms. Holland says she usually votes for Democrats but does not always vote a straight-party ticket. Holland Dep. at 13, 15.

Thelma Ruth Hunter is an 85-year-old woman who has resided and voted in person in Indianapolis her entire life. She was born at home in Tennessee and to her knowledge, no current certificate of her birth exists. Ms. Hunter

has attempted to obtain a "delayed certificate of birth" from Tennessee but has been unable to do so. Hunter claims she is a longtime supporter of Democratic candidates. *See generally* Hunter Aff.

Ernest Pruden is a 74-year-old Marion County resident who has worked at the polls previously and does not have the necessary identification to vote under SEA 483. State's Ex. 58 ("Pruden Dep.") at 7, 12-15. He reports that he does not have a birth certificate and is uncertain as to what he would need to do to obtain a certified copy of his birth certificate from North Carolina, the state where he was born. He works at the polls in the apartment building (Lugar Towers) where he lives. Mr. Pruden typically votes in both the primary and general elections. Pruden Dep. at 17-18, 24, 26-27.

Barbara Smith is 71 years of age and resides in Marion County. State's Ex. 56 ("Smith Dep.") at 5-6, 13. She does not have a driver's license or state-issued photo identification card. She has a photo identification card issued to her by the federal government to her as a retiree, but as it lacks an expiration date, it will not suffice under SEA 483. However, she does have access to transportation by family members whenever she needs it and she has a certified birth certificate. *Id.* at 17. Ms. Smith frequently works at a precinct polling place on election day as a Judge for the Democratic Party and, as a result, has voted absentee. Smith Dep. at 7-8, 13. Ms. Smith intends to vote in the May primary but claims she does not want to vote absentee. Smith Dep. at 7-9, 14.

Helen Wright suffered a heart attack in recent weeks and was unavailable to be deposed. She will be 65 years of

age in 2006. State's Ex. 75 (Wright's postcard survey response to the Democrats).

Robert G. Yancey, a poll worker for the Democrats, (State's Ex. 60 ("Yancey Dep.") at 9), has a non-license photo-identification card issued by the BMV that does not expire until 2009. Yancey Dep. at 7-8.

B. *ICLU Plaintiffs.*

1. *Representative William Crawford and Trustee Joseph Simpson.*

Representative William Crawford ("Rep. Crawford") is a member of the Indiana House of Representatives, representing House District 98. See State's Ex. 61 ("ICLU Compl.") at ¶ 27. Rep. Crawford possesses the photo identification required by the Voter ID Law. Rep. Crawford states that he has been told by a number of persons that they do not have the required identification to be able to vote, Crawford Dep. at 22, 80; however, he has not identified any such persons by name to the Court. *See* State's Ex. 62 ("Crawford's Response to Interrogatories and Request for Production") at ¶ 1. Rep. Crawford believes that SEA 483 will be an obstacle to poor persons seeking to vote, which concerns him as a politician because in his experience the more people who come out to vote, the better it is for his electoral chances. Crawford Dep. at 32, 127, 130. As a civil rights advocate, Rep. Crawford finds SEA 483 to be "patently offensive," Crawford Dep. at 47-48, and, as a personal matter, he regards having to produce identification in order to vote "offensive." Crawford Dep. at 31.

Plaintiff Joseph Simpson has been an elected Washington Township Trustee for over twelve years and also

serves as an elected precinct committee-person. Simpson Dep. at 11-13. Trustee Simpson has a driver's license issued by the BMV. State's Ex. 63 ("Simpson's Response to Interrogatories and Request for Production"), at ¶ 7. Like Rep. Crawford, Trustee Simpson has generally alleged that some citizens who have voted for him in the past do not have the sort of photo identification required by SEA 483; also, like Rep. Crawford, he was unable to identify any such voters by name to the Court. Simpson Dep. at 79, Ex C; Simpson's Response to Interrogatories and Request for Production ¶ 1, 3. Simpson fears that some people will walk away from the polls once they are challenged and he also believes that SEA 483 will increase the number of voter challenges. Trustee Simpson Dep. at 41-42, 62-64, 77. Simpson believes that the more people who are able to vote, the more votes he will receive. Simpson Dep. at 18-19. On a personal basis, Simpson strongly objects to having to show his identification in order to vote. Trustee Simpson Dep. at 21-23.

2. *The Organization Plaintiffs.*

Concerned Clergy of Indianapolis ("CCI") is an organization "dedicated to advancing social justice issues, particularly issues affecting the poor in Indianapolis." ICLU Compl. at ¶ 51. CCI asserts that its members include "poor persons in the City of Indianapolis." *Id.* at ¶ 52. CCI also has elected officers and formal members who join after being voted into membership. Deposition of Margie Oakley ("Oakley Dep.") at 10-13 and Ex. G (Interrogatories). CCI does not maintain any records identifying its members who do or do not possess driver's licenses or non-license photo identification. State's Ex. 66 ("CCI Responses to Interrogatories and Request for Production") at ¶ 6.

Margie Oakley, CCI's designated deponent, conceded that no CCI members have indicated to her that they do not have photo identification and that no CCI members have told her that SEA 483 will prevent them from voting. Oakley Dep. at 16, 20. However, CCI asserts that some of its members have indicated that they would be discouraged from voting because of SEA 483. Oakley Dep. at 17.[27] One of CCI's officers is Rev. Leroy Dinkins, the current vice president. Although Rev. Dinkins has a valid driver's license, he is strongly opposed to any law that requires him, or any other person, to show photo identification in order to vote and prefers not to have to show photo identification in order to vote. Dinkins Aff. at ¶¶ 1, 3, 4, 6. CCI contends that, in response to the passage of the Voter ID law, it will have to expend its limited financial resources to assist persons with paying the costs of birth certificates so they can vote. Oakley Aff. at ¶¶ 3, 5.[28] CCI also contends that, to extent SEA 483 lessens the political clout of minorities and poor persons, it lessens CCI's effectiveness as well. Oakley, Ex. G at ¶ 8.

The Indianapolis Resource Center for Independent Living ("IRCIL") is a center for independent living funded by the federal government through Title 7 of the Rehabilitation Act. Deposition of Melissa Madill ("Madill Dep.") at

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[27] It is unclear from Ms. Oakley's deposition why these individuals will be discouraged from voting. She suggests a variety of explanations, including offense over SEA 483's requirements, as well as, the hassle in obtaining and presenting a photo identification at the polls. Oakley Dep. 17-19. As we previously mentioned, however, Ms. Oakley has testified that no members have actually told her they do not already possess the requisite photo identification.

[28] CCI also offered unsubstantiated allegations concerning the impact of SEA 483 on the ability of "poor persons" to vote.

72. According to the IRCIL's bylaws, its members include its board of directors and "the people with disabilities whom we serve." State's Ex. 65 ("IRCIL's Response to Interrogatories and Request for Production"), at ¶ 2. IRCIL asserts that many of its members "may not have . . . valid photo identification" and "will be discouraged from voting" by SEA 483. ICLU Compl. at ¶¶ 45, 48. However, IRCIL has not identified any such member to the Court. IRCIL's Response to Interrogatories and Request for Production at ¶ 4. In fact, Melissa Madill, IRCIL's designated deponent, said that none of the 15 members with whom she had spoken concerning the Voter ID Law since it was enacted have said that they would be unable to vote because of the law. Madill Dep. at 23. The IRCIL assists its clients in obtaining identification cards from the BMV, although it does not pay the cost of the underlying documents, such as birth certificates. Affidavit of Melissa Madill ("Madill Aff.") at ¶¶ 2, 3. The IRCIL states that, with the passage of the Voter ID law, it will have to devote more of its staffing resources to working with clients in order to try to collect the information necessary to obtain an identification card which, they say, will inevitably mean that staff will be less able to devote their time to other issues of importance to IRCIL's clients. *Id.* at ¶¶ 4, 5.

The Indiana Coalition on Housing and Homeless Issues ("ICHHI") is a statewide coalition of organizations and individuals who advocate for persons who experience homelessness as well as low-income persons and families across Indiana. Deposition of Michael Reinke ("Reinke Dep.") at 6. ICCHI's members include paid members who generally are organizations such as homeless shelters, day shelters, and mental health centers, among others. Reinke Dep. at 10-12. ICHHI considers all homeless persons who

receive services to be members as well. Reinke Dep. at 11. ICHHI states that it is aware that "many homeless and impoverished persons do not have valid driver's licenses and state identification cards" and that SEA 483 "will prohibit members of ICHHI from voting because they will not be able to timely satisfy the identification requirements." *Id.*, at ¶¶ 71, 78. However, ICHHI has been unable to identify any such affected individuals members. State's Ex. 68 ("ICHHI's Response to Interrogatories and Request for Production"), at ¶ 5. In response to a survey, several of ICHHI's member organizations stated they were aware that many homeless persons do not have photo identification. However, those surveys do not identify any such individuals by name, nor do they indicate whether such homeless persons are members of ICHHI or one of its member organizations. *See* State's Ex. 69 ("ICHHI Survey Responses"). ICHHI contends that SEA 483 will reduce the political power of homeless persons and, thus, will make it more difficult for ICHHI and its member organizations to advocate on issues affecting homeless persons. Reinke Dep. at 8-9.

The Indianapolis Branch of the NAACP ("NAACP") is the local branch of the well-known, national civil rights organization. ICLU Compl. at ¶ 61. The NAACP has 1500 members in Marion County. Deposition of Roderick Bohannan ("Bohannan Dep.") at 16. It is non-partisan and registers persons to vote and encourages persons to vote. Bohannan Dep. at 25, 47. The NAACP alleges that SEA 483 will "make it more difficult for NAACP members . . . to participate in elections." *Id.* at ¶ 65. However, the NAACP has not identified any individual members who allegedly will be harmed by SEA 483. State's Ex. 67 ("NAACP's Responses to Interrogatories and Request for Production")

at ¶¶ 5, 7. Roderick Bohannan, the NAACP's designated deponent, testified that he has heard some members say, "I don't think I'll be able to vote the way the statute is construed," but he could not identify anyone in particular who had made such assertions. Bohannan Dep. at 19. Bohannan strongly objects to being required to show his BMV issued identification in order to vote. Bohannan Aff. at ¶¶ 1, 3, 4. The NAACP maintains that, to the extent that SEA 483 diminishes the political clout of African-Americans, it renders the NAACP and its branches less effective in arguing in support of their issues. (Bohannan Dep. Ex. H at ¶ 9). Finally, Bohannan contends that in response to the passage of SEA 483, the NAACP will have to divert funds and energies into educational and outreach efforts to inform the public about the law so as to maximize the number of persons who will be able to vote. *Id.* at ¶ 5.

United Senior Action of Indiana ("USA") is a 15,000 member, not-for-profit organization that is designed to promote and advocate issues of interest and importance to senior citizens. Deposition of Michelle Niemier ("Niemier Dep.") at 17 and Ex. D, Request No. 1. USA's members join the organization by paying dues. State's Ex. 64 ("USA Response to Interrogatories and Request for Production") at ¶ 2. USA states that it has received complaints from its members to the effect that SEA 483 would prevent people from being able to vote or will discourage people from voting; however, USA has not identified any specific members and USA does not have any records identifying members who have or do not have driver's licenses or non-license photo identification. Niemier Dep. at 24, 38-39; USA Response to Interrogatories and Request for Production at ¶¶ 5, 6. Michelle Niemier, the Executive Director of

USA, testified that she has "not spoken to any individual members [of USA who said that they] will not be able to vote because of [SEA 483], since it's enacted." Niemier Dep. at 24-25.[29] USA is also concerned that the organization's effectiveness as an advocate for the elderly will be diminished as its members' ability to vote is diminished. Niemier Dep. Ex. D Interrogatories ¶ 7.

VI. The Defendants.

The two sets of defendants in this case are the Marion County Election Board ("MCEB") and Todd Rokita, in his official capacity as Indiana Secretary of State, defendants J. Bradley King and Kristi Robertson, in their official capacities as Co-Directors of the Indiana Election Division.

A. *Marion County Election Board.*

The defendants The Marion County Election Board is, as indicated above, the entity that is responsible for the oversight of elections in Marion County, Indiana. Sadler Dep. 6. The Election Board consists of the Marion County Clerk and two other persons. Sadler Dep. 6-7. The Clerk acts as election administrator in Marion County. Sadler Dep. 6.

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[29] Niemier further testified that USA has not conducted a survey to determine whether any seniors will be affected by the law, and the assertion in Paragraph 38 of the ICLU Complaint that many seniors do not have driver's licenses or other photo identification is based only on her "experience with the organization and conversations over the last 16 years [with] our members." Niemier Dep. at 23.

B. *The Secretary of State and the Co-Directors Of The Indiana Election Division.*

Plaintiffs have also named as defendants Todd Rokita, in his official capacity as Indiana Secretary of State, defendants J. Bradley King and Kristi Robertson, in their official capacities as Co-Directors of the Indiana Election Division.[30] As indicated above, The Indiana Election Division provides advice and instruction to county election officials and publishes information and forms for use in Indiana elections. *See* Ind. Code § 3-6-4.2-1, et seq.; Deposition of Co-Director J. Bradley King, Attachment 2 ("King Dep.") at 7. Rokita, as Indiana Secretary of State, is the state's chief election official for all purposes (except for the coordination of State responsibilities under the National Voter Registration Act ("NVRA"), *see* Ind. Code § 3-6-3.7-1), and is broadly charged with performing all ministerial duties related to the administration of elections by the

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[30] On May 20, 2005, Defendants moved to dismiss the Secretary of State and the Co-Directors of the Election Division as defendants. In our July 1, 2005, Entry we held:

> [A]t this juncture, we are unable to say definitively that enforcement of SEA 483 will not implicate at least some of the official statutory responsibilities of Defendants Rokita, King, and Robertson. Such a determination requires an in-depth, overarching understanding of the election process and state election laws which this court does not possess at the outset of this litigation. Consequently, we shall hold the motion to dismiss under advisement and stay a final ruling, thus requiring these defendants to remain as parties to defend their interest, if any, as it may present itself . . . [however] we can and shall relieve Defendants Rokita, King, and Robertson of the obligation to actively participate in the development of this litigation, unless and until otherwise ordered by the Court.

July 1, 2005, Entry at 2-3. In light of our present ruling in favor of Defendants, the Motion to Dismiss is hereby *DENIED* as moot.

state, Ind. Code § 3-6-4.2-2(a), and serves as one of the three members of the Indiana State Recount Commission, Ind. Code § 3-12-10-2.1(a) and (b); and Ind. Code § 3-12-10-4(a).

VII. Brace Report.

The Democrats submitted an expert report prepared by Kimball W. Brace (the "Brace Report") reflecting his conclusion that at least 51,000 registered voters and as many as 141,000 registered voters in Marion County, and up to 989,000 registered voters in the State of Indiana, do not currently possess a BMV-issued driver's license or photo identification. Brace Report at 8-10. Brace also claims to have determined that registered voters who reside in census block groups with a median household income of less than $15,000 are more than twice as likely not to possess photo identifications as are registered voters who reside in census block groups with a median household income of more than $55,000. Brace Report at 9-10, Tables F and G.

We have not included the Brace Report in our determinations because we view the analysis and conclusions set out in it as utterly incredible and unreliable. Reliability is the fundamental principle upon which the admissibility of expert opinions and testimony is based, pursuant to Federal Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon

> sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Brace report fails to satisfy the latter two of these requirements. We lack the time and space to discuss the numerous flaws in Brace's report; instead, we shall highlight the report's most significant failings, including: (1) failing to account for voter roll inflation, (2) comparing demographic data from different years without qualification or analysis, (3) drawing obviously inaccurate and illogical conclusions, and (4) failing to qualify the statistical estimates based on socioeconomic data. Moreover, to the extent that the data on which Brace based his report is admissible, it actually strengthens the Defendants' contentions, not the Plaintiffs. We discuss each of these weaknesses in greater depth below.

A. *Brace failed to correct for voter roll inflation.*

The major flaw in Brace's report is that, while he concedes there is some inflation of the Marion County voter rolls, his analysis includes absolutely no attempt to correct for such surplusage. Inflation of voter rolls directly impacts Brace's conclusions because his analytical method consists of tabulating and characterizing voter registrations that cannot be matched to BMV records. Inflated voter registration thus leads to inflated conclusions regarding the number of voters without a state driver's license or identification card whom Brace claims to have identified. Borrowing the apt computer expression: "garbage in, garbage out."

Brace's decision not to compensate for excess voter registrations is even more confusing (and inexcusable) in light of the fact that he adjusted the BMV records to remove duplicate records[31] without performing a similar adjustment to the voter registration list. As far as we can discern, the only adjustments that Brace performed to the voter registration list were (1) prior to conducting the income and education level analysis, Brace omitted the entries for registered voters whose listed addresses did not correspond to a census block that had any voting age population reported by the 2000 Census (presumably because he was "not able to associate income characteristics to them"); and (2) Brace removed the "inactive" voter registrations from the list of unmatched voters produced using "tightened criteria." However, in reporting his conclusions as to the total number of "affected individuals," Brace once again included the voter registrations which were inactive and/or corresponded to unpopulated census blocks. All of these adjustments and this methodology reveal a conscious effort by Brace to report the largest possible number of "individuals impacted by the implementation of SEA 483," regardless of the reliability of that number.

Brace's decision to adjust the BMV records, which no one has argued are inflated, contrasted with his obvious failure to adjust the voter registration records, which all the parties appear to agree are inflated in Indiana, "indicates a failure to exercise the degree of care that a statistician would use in his scientific work, outside of the context

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[31] "In most instances this was due to the fact that an individual had both a commercial driver's license as well as a regular driver's license." *Id.* at 5.

of litigation." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). As the Seventh Circuit has explained: "In litigation an expert may consider (he may have a financial incentive to consider) looser standards to apply. Since the expert's statistical study would not have been admissible at trial, it was entitled to zero weight in considering whether to grant or deny summary judgment." *Id.*

B. *Brace's report compares demographic information from varying years without analysis or qualification.*

Another significant failure in Brace's report is that he attempted to compare BMV and voter registrations records from 2005 to Census population numbers from the year 2000, without attempting to adjust for the time difference. We suspect that such temporal variations play a role in creating some of the incredible numbers Brace has included in his report, such as his claim that in census blocks with median incomes over $55,000 there were 8,000 more BMV records (for individuals over the age of eighteen) and 10,000 more voter registrations than actual voting age individuals recorded by the Census; (the BMV and voter registration records representing 106.4% and 107.9%, respectively, of the voting age population). *See* Brace Report, Tables D and F.[32] Since Marion County's total population was relatively static between 2000 and

[32] Brace lists the voting age population as 127,554, the number of BMV records as 135,780, and the number of registered voters as 137,633. Brace Report, Table D and F.

2004,[33] Brace's numbers suggest either that BMV and/or voter registration records are significantly inflated, the Census significantly undercounted high-income individuals (a claim we have not heard levied before), or that there was significant net migration into higher income census blocks during the intervening five years. Brace's report does not address any of these incongruities nor does it include any effort to otherwise adjust, explain, or qualify his results in light of the obvious temporal difference in his data sources. Such failures again demonstrate "a failure to exercise the degree of care that a statistician would use in his scientific work, outside of the context of litigation." *Sheehan,* 104 F.3d at 942.

C. *The conclusions of Brace's report are totally unreliable.*

Further undermining the reliability of Brace's report is the fact that he apparently did not make any attempt to determine if his conclusions were in any way realistic, which they clearly are not. In his conclusion, Brace states:

> Based on our analysis to date, it is clear that there will be a significant number of individuals impacted by the implementation of SEA 483. Our research shows that at least 51,000 registered voters and more likely 141,000 registered voters, in Marion County alone would have to obtain a drivers license or ID in order to vote. If these

[33] The Census estimates indicate that Marion County's population growth between April 1, 2000, and July 1, 2004, was 0.4%, resulting in slightly over 3,000 additional residents living in Marion County in 2004 than 2000. *See* Marion County Quick Facts, available at: http://quickfacts.census.gov/qfd/states/18/18097.html

> patterns were to hold true for the rest of the state, as many as 989,000 registered voters in the state could be challenged when they try to go vote in November, 2006.

Brace Report at 10.

Brace's prediction of 989,000 voters who likely will be challenged at the next general election is obviously unbelievable for several reason. First, in his report, Brace specifically notes that Marion County is not representative of the other counties in Indiana and, in particular, Brace "assumed that [Marion County] would have a higher number of non-drivers, compared to other jurisdictions in the state." *Id.* at 5. Given that even Brace himself believes that the Marion County data will not "hold true for the rest of the state," we are at a loss to understand why in his Conclusion he uncritically provides estimates which assume otherwise. At the very least, Brace should have included a discussion comparing the demographic data for Marion County with the data for the rest of the counties in Indiana in order to provide some reasonable basis on which the conclusions based on the former could be extended to the latter.

Second, Brace apparently did not undertake even the most rudimentary effort to test the reliability of his theoretical conclusions. For example, in his report, Brace indicates that, as of August 2005, there were 4,569,265 Indiana driver's license or identification cards possessed by individuals over the age of eighteen.[34] By adding in

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[34] This number is reached by taking 5,196,162 total records minus 309,759 duplicate records minus 317,138 records for individuals under the age of eighteen. Brace Report at 5.

Brace's estimated 989,000 registered voters without licenses, the total is 5,558,265 individuals over the age of eighteen who either are registered to vote in Indiana or possess an Indiana driver's license or identification card. This number represents an incredible 123% of Indiana's entire voting age population, as reported by the 2000 Census, and 120% of the Census's estimate for Indiana's voting age population as of July 1, 2004.[35] Brace's report fails to explain where or how this bonanza of hitherto unaccounted for individuals occurred or how his conclusions are reconcilable with the Census data.

Brace's conclusions regarding only Marion County are equally unreliable. If the number of affected individuals Brace claimed to have identified is combined with the number of individuals with Indiana driver's licenses or identification cards, the result is between 103% and 116% of the voting age population of Marion County.[36] Once

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[35] The 2004 Census estimates the population of Indiana, at 6,237,569, minus the 25.9% of the population estimated to be below age eighteen leaves us with 4,622,039 Indiana residents at least eighteen-years-old. *See* Indiana Quick Facts, available at http://quickfacts.census.gov/qfd/states/18000.html. (The 25.9% was obtained from 2000 Census data). We recognize there is an increased degree of uncertainty surrounding this estimate since it relies on combining numbers from different Census years. Moreover, since Indiana's population is estimated to have grown by approximately 150,000 between 2000 and 2004, using a 2004 estimate may make Brace's conclusions appear marginally more reasonable. Brace's report relies on 2005 BMV records.

[36] The results are 102.9% for the "loose match," 116.4% for the "tightened criteria," and 106.7% for the "tightened criteria" minus inactive voters. In the case of the Marion County data, there is little difference using the 2004 estimated population, as opposed to the 2000 Census number, since the county's population is estimated to have grown only 0.4% in the intervening four years. All Marion County data was obtained from the Census Bureau's Marion County Quick Facts and is available at http://quickfacts.census.gov/qfd/states/18/18097.html.

again, Brace's report provides no explanation as to how these results can be reconciled with the Census data.

The fact that Brace's mathematical extrapolations are in conflict with the Census results should not come as a surprise. As mentioned above, Brace has admitted that he believes the Indiana voter rolls are inflated, making it entirely logical and predictable that his analysis would produce inflated numbers of affected voters. These obvious and otherwise unexplained analytical failures, once again, represent "a failure to exercise the degree of care that a statistician would use in his scientific work, outside of the context of litigation." *Sheehan,* 104 F.3d at 942.

D. *Brace's failure to qualify his statistical estimates based on socioeconomic data.*

In addition to the above, Brace's statistical estimates based on socioeconomic data are even more suspect for several reasons: (1) Brace's economic (and education) analysis appears to suffer from aggregation bias because he was forced to aggregate his data to census block groups instead of focusing only on individuals,[37] a matter left unaddressed by Brace in his report; (2) there is no indication in the report whether Brace's socioeconomic results are statistically significant and Brace does not mention performing any generally accepted estimates of significance or uncertainty;[38] and (3) Brace made no attempt to

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[37] *See* Katz report at 6.

[38] *See* Katz report at 7. Such an analysis is especially warranted with respect to Brace's consideration of census blocks with median incomes less than $15,000, which account for only 1% of the Marion County voter registrations and voting age population in Brace's

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factor in the impact of SEA 483's exceptions, such as the indigent exception, which would directly effect his computations, especially with respect to Census blocks with median incomes below $15,000. These methodological failings are of the same sort that led the Seventh Circuit to exclude the expert report in *Sheehan* and to remark that the report "was entitled to zero weight in considering whether to grant or deny summary judgment." *Sheehan,* 104 F.3d at 942.

E. *Brace's Report actually strengthens the State's arguments.*

To the extent that Brace's results are admissible evidence, the findings do not help the Plaintiffs' case, indeed, they strengthen the State's contentions.

Brace's report reveals several important reasons to question the reliability and accuracy of Indiana's voter rolls. For example, Brace reports there are tens of thousands of voter registrations in Marion County alone which list their address as being within an unpopulated census block and there are additional thousands of voter registrations whose existence cannot be reconciled with BMV records and/or Census numbers.[39]

Brace's report also suggests that the vast majority of Indiana's voting age population already possesses the

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analysis, but are the centerpiece of his socioeconomic conclusions. *See* Brace Report, Tables D, F, G.

[39] It is also possible that Indiana's BMV records are significantly inflated or that the Census Bureau undercounted Indiana's population; however, all the parties and experts appear to agree that Indiana's voter rolls are inflated.

requisite photo identification required by SEA 483. Comparing the number of 2005 BMV records in Brace's report to Census' estimates for Indiana's voting age population indicates that, as of 2005, there were only 43,000 Indiana residents without a state-issued driver's license or identification card.[40] In other words, an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements of SEA 483.[41] Moreover, Brace's report suggests that the fewer than 1% of individuals without acceptable Indiana photo identification are substantially concentrated in Marion County,[42]

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[40] Brace reported that there were 4,569,265 non-duplicate 2005 BMV records for individuals over the age of eighteen. Brace Report at 5. The 2004 Census estimate for the voting age population of Indiana is 4,590,851, or 21,586 more than the number of 2005 BMV records. Still, there remains the problem of comparing 2005 BMV numbers with 2004 Census estimates. Perhaps the best approach is to compensate for that intervening year by assuming Indiana maintained its 2000 to 2004 annual growth rate, which would add approximately 21,500 additional individuals to the voting age population by August 2005. This produces an estimated total of 43,000 more Indiana residents than Indiana had issued photo identifications. *See* Indiana Quick Facts, available at http://quickfacts.census.gov/qfd/states/18000.html. We note that the BMV representative testified that the BMV was unable to determine the number of Indiana residents without an Indiana driver's license or identification card. *See* Redman Dep. at 22-30.

[41] The 43,000 estimated individuals without identification comprise 0.9% of the Census 2004 Indiana estimated voting age population of 4,590,851. Adjusting the estimated voting age population to account for 2004 to 2005 population growth would also produce a result of 0.9% of the voting age population. *See* Indiana Quick Facts, available at http://quickfacts.census.gov/qfd/states/18000.html.

[42] Brace reported a total of 609,961 non-duplicate BMV records for individuals over the age of eighteen who list addresses in Marion County. Brace Report at 5. The 2004 Census estimated voting age population of Marion County is 640,778, adjusted for population growth between year 2004 and 2005; we estimate the 2005 voting age population is roughly 641,400. The difference between Census estimated

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which has a metro bus system and multiple BMV branch locations thereby greatly facilitating the ability of these affected individuals to obtain the necessary photo identification.[43]

To the extent that Brace's socioeconomic analysis is accurate, his report revealed no potential disparate impact of SEA 483 based on a voter's race or education level and only a small potential disparate impact based on income level, specifically, in census blocks with median incomes

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population and number of BMV records is 31,500. All Marion County data obtained from the Census Bureau's Marion County Quick Facts and is available at http://quickfacts.census.gov/qfd/states/18/18097.html.

[43] We do not believe our simple analysis is in anyway complete or definitive. We recognize there are several factors which suggest the percentage of Indiana's voting age population with photo identification is actually lower than 99%; for example our simple comparison of raw numbers does not take into account: individuals who have died but whose Indiana driver's license or identification cards have not expired; individuals who have moved outside the state and no longer consider themselves Indiana residents but who still retain a valid Indiana license or identification card; individuals who have moved into Indiana and now consider themselves Indiana residents but have not yet obtained an Indiana license or identification; and individuals, such as students, who are residing in Indiana temporally, are registered to vote in another state, but have obtained an Indiana license or identification.

On the other hand, there are several factors which suggest our analysis may overstate the number of individuals impacted by SEA 483, such as: BMV records do not encompass the other forms of state and federal photo identification acceptable under SEA 483; BMV records do not account for the various exceptions to the photo identification requirement, such as the exception for indigent and absentee voters; and the Census population estimates include thousands of Indiana residents who are not registered to vote and thus will not be able to vote regardless of SEA 483's photo identification requirements.

We do not have the resources to evaluate and weigh these various factors; however, a serious analysis of SEA 483's impact on Indiana voters should attempt to take at least some of these factors into account.

below $15,000.[44] However, as noted above, Brace's conclusions with respect to income are even more suspect than his report in general.

Finally, to the extent that Brace's socioeconomic analysis is accurate, his report confirms that we should not assume disparate impact based on what "common sense" tells us to be true. In interpreting Brace's results, the Democrats argue:

> Common experience tells us that the persons without such identification are likely to come from segments of the society that do not drive, including those without the financial ability to afford vehicles. The Brace study confirms what common sense tells us. The Brace study reveals that those registered voters without BMV-issued identification are almost twice as likely to reside in census block groups with a lower median income.

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[44] Brace's "loose match" found that the percentage of voter registrations which could not be matched to a BMV record was higher in census blocks with median incomes below $15,000 and lower in census blocks with median incomes above $55,000. The census blocks with intermediate median incomes were generally comparable to each other. Brace's two "tightened criteria" analyses found the percentage of voter registrations which could not be matched to a BMV record declined as the median income of the census block rose. Brace's "loose match" revealed a slightly increased percentage of "unmatched voters" among census blocks with college and graduate degrees. Brace's two "tightened criteria" analysis, however, found that the percentage of "unmatched voters" decreased as the census block's education level increased. In his report, Brace highlights the results of the "tightened criteria" educational level analysis; however, he does not discuss if, how, or why this data conflicted with the results of the "loose match" analysis. *See generally* Brace Report, Tables D, F, G.

Democrats' Reply Brief at 28. Brace's report, to the extent it is accurate, actually indicates that voters without photo identification are not significantly more likely to come from low income segments of society. Brace's research establishes that, under any of his criteria, less than 2% of his "unmatched voters" reside in census blocks with median incomes below $15,000.[45] In fact, under any of Brace's criteria, between 61% and 65% of his unmatched voters live in census blocks with median incomes above $35,000, which roughly corresponds to the 63.9% of the voting age population he lists as residing in those areas.[46] Thus, there is scant support in Brace's report supporting the "common sense" observation that low income individuals will be disproportionately impacted by SEA 483's photo identification requirements.[47]

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[45] This is true in large part due to the fact that only approximately 1% of the voting age population lives in such census blocks.

[46] The "loose match," "tightened criteria," and "tightened criteria minus inactive voters" reported the following percentages of unmatched voters residing in census blocks with median incomes above $35,000: 65%, 60.9%, and 62.3%. According to Brace's report, an estimated 63.9% of the voting age population, and 67.8% of voter registrations, reside in census blocks with median incomes above $35,000. The voter registration percentage, however, is suspect since, as we discussed above, Brace's report also indicates there are more than 10,000 additional voter registrations than estimated voting age individuals residing in census blocks with median incomes above $55,000 (voter registrations correspond to 107.9% of the voting age population). *See* Brace Report, Tables D, F, G. We chose "above $35,000" as a grouping because according to the 2000 Census, the median income in Marion County was $40,421 (1999 data), which falls in the middle of Brace's $35,000 to $45,000 analysis bracket. Marion County median income data obtained from the Census Bureau's Marion County Quick Facts is available at http://quickfacts.census.gov/qfd/states/18/18097.html.

[47] Based on the factors mentioned above, we do not believe that Brace's socioeconomic conclusions are reliable; however, in the context

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Although the Brace Report carries some weight, albeit very little, we base our legal analysis primarily on the facts submitted by the parties, as discussed above, including: Indiana election law and procedure, requirements for obtaining photo identification documents from the BMV, evidence regarding voter fraud, evidence of potential impacts of SEA 483 on Indiana voters, and facts related to the parties in this litigation. Based on these facts, we turn now to our discussion and application of the controlling legal principles.

Legal Analysis

I. Plaintiffs' Article III Standing.

Before addressing the legal merits of SEA 483, we first must determine whether the named plaintiffs to this litigation have standing to bring it. Defendants challenge the Article III standing of every plaintiff, contending that they lack standing in their own right, standing to assert the rights of third parties or, with regard to the organizations, standing to assert the rights of their alleged members. The only standing which Defendants do not contest is that of the Democrats in bringing their political association claim. Plaintiffs respond, individually and jointly, that all have standing to bring all the claims raised in this lawsuit.

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of this litigation, it is noteworthy that a $40,000 study commissioned by the Plaintiffs so dramatically undercuts the "common sense" arguments on which the Plaintiffs repeatedly urge this court to rely. If nothing else, the Brace report convinces us that speculation as to "likely" impacts of SEA 483 on various demographic groups would be neither judicious nor appropriate.

The Seventh Circuit has articulated the standing requirement as follows:

> Standing is 'an essential and unchanging part of the case-or-controversy requirement of Article III.' *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The burden to establish standing is on the party invoking federal jurisdiction – here, [Plaintiffs] – and the elements it must show are: (I) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (ii) a causal relation between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision.

DH2, Inc. v. U.S. S.E.C., 422 F.3d 591, 596 (7th Cir. 2005) (citing *Lee v. City of Chicago,* 330 F.3d 456, 468 (7th Cir. 2003) (citing *Lujan,* 504 U.S. at 560-61)). To satisfy the injury-in-fact requirement, Plaintiffs "'must establish that [they have] sustained or [are] immediately in danger of sustaining some direct injury.'" *Id.* (quoting *Wis. Right to Life, Inc. v. Schober,* 366 F.3d 485, 489 (7th Cir. 2004)) (quoting *Tobin for Governor v. Ill. State Bd. of Elections,* 268 F.3d 517, 528 (7th Cir. 2001)). However, "[m]ere speculation is not enough to establish an injury in fact." *Id.* (quoting *Wis. Right to Life,* 366 F.3d at 489).

A plaintiff which is an association has Article III standing to represent the interests of its members if: "'(1) the conduct challenged is injurious to its members, (2) the claim asserted is germane to the association's purposes, and (3) the cause can proceed without the participation of the individual members affected by the challenged conduct.'"

Hope, Inc. v. DuPage County, Ill., 738 F.2d 797, 813 (7th Cir. 1984) (quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)); *See also Texas Independent Producers and Royalty Owners Association v. E.P.A.*, 410 F.3d 964, 971 (7th Cir. 2005). Representational standing requires that the association demonstrate that the members whose rights it is asserting "'are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'" *Hope*, 738 F.2d at 813 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

In certain limited situations, a plaintiff may have standing to raise the rights of third parties not otherwise before the court. The Supreme Court has imposed three conditions which must be satisfied before a plaintiff can assert the rights of a third party: (1) the plaintiff has suffered an "injury in fact;" (2) the plaintiff has a "close relationship" to the injured third party; and (3) there was some hindrance to the third parties in asserting their own rights. *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (allowing a criminal defendant to raise the rights of jurors). However, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (quoting *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984))).

For clarity of analysis, because the issues are uniformly applicable as to each group, we have categorized the various Plaintiffs into the following three similarly situated groups: the Democrats, Rep. Crawford and Mr.

Simpson, and the Organizational Plaintiffs, each of which grouping we discuss below. Prior to analyzing the respective arguments of each group of plaintiffs, we address one principle of standing that cuts across all three groups, namely, that "mere offense" taken or felt in reaction to a statute's requirements is not sufficient injury to confer Article III standing.

A. *"Mere Offense" Is Not Sufficient Injury to Confer Standing.*

Several Plaintiffs attempt to establish standing based on their sense of personal offense at being required to provide identification in order to vote.[48] Offense alone in response to government policies or requirements does not suffice to create standing: "Otherwise there would be universal standing: anyone could contest any public policy or action he disliked. There must be a concrete injury." *Books v. Elkhart County, Ind.*, 401 F.3d 857, 870 (7th Cir. 2005). Moreover, in determining Article III standing, "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an 'injury in fact' for constitutional purposes." *Id.* (internal quotation omitted). Accordingly, no Plaintiff in this case may continue to litigate if the only injury is the offense taken in having to present, or in observing others present, photo identification in order to be permitted to vote.

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[48] *See, e.g.*, Crawford Dep. at 31; Simpson Dep. at 21-23; Aff. of Rev. Leroy S. Dinkins at ¶¶ 3, 4, 6; Aff. of Roderick Bohannan at ¶¶ 1, 3, 4; Chapman Dep. at 6.

B. *The Democrats' Standing.*

1. *Standing for An Associational Rights Claim.*

None of the parties disputes that the requirements of SEA 483 impede the Democrats' ability to permit citizens who do not have photo identification to vote in their primary elections, which in turn interferes with their right to freely associate with those citizens for political purposes. All the parties agree, and we concur, that this constitutes a direct injury to the Democrats' right to freely associate and suffices to confer standing on these parties.[49]

2. *Standing of MCDCC to Assert Rights of Its Members.*

The MCDCC has identified four members; however, all have the necessary photo identification to vote in person under SEA 483. Accordingly, MCDCC cannot establish standing based on alleged injuries to its members. *Hope, Inc. v. DuPage County, Ill.*, 738 F.2d 797, 813 (7th Cir. 1984).

3. *Standing to Assert the Rights of Any Voter Who Votes (or Might Vote) Democratic.*

Democrats broadly contend that they "have standing to assert the rights of those registered voters who associate with them and who will be voting, or who desire to vote, in future elections for public office, including the elections scheduled in May and November, 2006." Democrats' Second Am. Compl. at ¶ 3. This assertion is premised

[49] We note, however, that the Democrats appear to have dropped their associational rights claim in their Reply Brief.

on the claim that the mere act of "desiring" to vote for a Democratic candidate makes an individual a "member" of the Democratic party. This argument is a bridge too far in view of applicable law. As the Seventh Circuit notes, "The Supreme Court has not seen fit to extend representational capacity standing to entities other than associations which actually represent interests of parties whose affiliation with the representational litigant is that of membership with the representative or substantial equivalent of membership." *Hope,* 738 F.2d, at 814. Neither "desiring" to vote for a candidate nor actually voting for that candidate constitutes membership or the substantial equivalent of membership in a political party. Indeed, if desire alone were enough, it appears that several of the Democrats' own witnesses would simultaneously be members of multiple political parties. Accordingly, the Democrats' attenuated claim of "membership" for any voter who will be voting or desires to vote for a Democratic candidate fails to confer standing to bring this lawsuit.

Assuming *arguendo* that the Democrats' representational standing claims include third-party voters not actually before the Court but who face insurmountable barriers in obtaining photo identification prior to the election, such voters' injuries resulting from enforcement of the SEA 483 are sufficiently identifiable and concrete as to allow them to assert their own individual claims as voters. Moreover, Democrats have not presented any substantiation that any such voters actually exist. Accordingly, we conclude that the Democrats are not positioned to raise the rights of third-party voters who are unable to obtain photo identification.

The situation is slightly different for voters who have secured or could secure the necessary photo identification

but, for some reason, will be unable to present such identification at the polls at the time of voting.[50] Under SEA 483, such voters will be allowed to vote, but only by utilizing a provisional ballot. Obviously, the exact identity of voters who will utilize provisional ballots because of their inadvertent lack of photo identification cannot be determined in advance. As a result, such affected voters also cannot assert their own rights in advance. Thus, the potential exclusion of votes by individuals intending to vote for Democratic candidates is sufficient to constitute an injury in fact to the Democrats; moreover, the potential exclusion of votes casts "doubt on the integrity" of the election. *See Campbell v. Louisiana,* 523 U.S. 392, 397 (1998) (holding a criminal defendant "suffers a serious injury in fact because discrimination at the voir dire stage casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt"). Much like the criminal defendant in *Campbell,* the Democrats share a common interest with their affected supporters, to wit, the ability of such supporters to vote for their preferred candidates. Accordingly, we conclude that the Democrats have satisfied *Campbell's* requirements for raising the third-party rights of voters who inadvertently are unable to present photo identification at the polls on election day.[51]

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[50] For example, their identification is stolen, forgotten, or lost.

[51] *See also Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565, 574 (6th Cir. 2004) (finding a political party had standing to assert the rights of voters who "cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place").

4. *Standing to Assert Rights of Named Individuals*

The Democrats claim they also have standing to assert the rights of the Named Individuals in this lawsuit. The Named Individuals all represent themselves to be members of the Democratic party and have consented to their representation by the Democrats in this lawsuit. Accordingly, though we can readily conclude that the Democrats have standing to assert the rights of these individuals, we are less clear concerning the specific rights the Named Individuals may possess in challenging the requirements of SEA 483. Whether the Named Individuals have standing must be assessed in terms of the two categories of claims advanced by the Democrats: first, with regard to the facial challenge to the photo identification requirement and, second, with regard to the equal protection claims under the 14th Amendment.

a. *Standing To Challenge The Photo Identification Requirement*

Our review has brought us to the conclusion that none of the Named Individuals has presented an "injury in fact" sufficient to confer Article III standing to challenge the photo identification requirement. The Democrats have identified twelve individuals whom they contend will be harmed by SEA 483. We note initially that no evidence was adduced concerning either Christiana Bohlander or Corinne Collins, and a third person, Helen Wright, unfortunately, has died since the case was filed. Of the nine remaining Named Individuals whom the Democrats claim

will be harmed by the provisions of SEA 483,[52] two possess the photo identification required by SEA 483 to qualify to vote in person,[53] and another possesses a certified birth certificate which enables her to obtain the necessary photo identification from the BMV for free.[54] Moreover, all nine of these potential voters are over the age of 65 and, therefore, automatically qualify to vote absentee, Ind. Code § 3-11-10-24(a)(5), as at least three of them have done in the past.[55] Voting by absentee ballot instead of in person does not, by itself, constitute an injury in fact since there is no established constitutional right to vote in person.[56]

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[52] The nine individuals are: David Harrison, Constance Andrews, Barbara J. Smith, Imogene M. Chapman, Ernest L. Pruden, Helen L. Wright, Lois E. Holland, Ronald Yancey, Bettie L. Weiss, and Thelma Ruth Hunter.

[53] Constance Andrews and Robert Yancey both have photo identification.

[54] Imogene Chapman has a certified birth certificate.

[55] Lois Holland, Imogene Chapman, Barbara Smith have all voted absentee in the past.

[56] The Seventh Circuit, in *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), held there was no constitutional right to vote by absentee ballot and, in so doing, implicitly held there was no constitutional right to vote in person. Indeed, the Seventh Circuit has held that with respect to voting methods, "One size need not fit all," noting that while some states allow every registered voter to vote by absentee ballot other states, such as Indiana, "have struck a compromise between concern with fraud and concern with turnout by allowing only certain classes of voter to cast an absentee ballot." *Id.* at 1131 (citing for the former position: Cal. Election Code § 3003; Colo. Rev. Stat. § 1-8-102; Fla. Stat. Ann. § 101.662; Wash. Rev. Code Ann. § 29A.40.010; and for the latter: Ala. Code 1975 §§ 17-10-3(a) and (b); Ark. Code Ann. § 7-5-402; Md. Code Ann., Election Law § 9-304; Minn. St. § 203B.02; N.J. Stat. Ann. § 19:57-3; N.Y. Elec. Law § 8-400; Tex. Election Code Ann. § 82.001(a)). *Id.* at 1131. Buttressing this logic is the fact that the Seventh Circuit observed, "[i]n Oregon, all ballots are absentee." *Id.* (citing O.R.S. § 254.465).

Further, the Democrats have not presented any evidence to the Court that voting absentee would be an actual hardship for any of the Named Individuals and, as we have noted above, their "mere offense" in having to vote absentee is insufficient to confer Article III standing. *See,* Legal Analysis Section I(A), *supra.* Accordingly, we conclude that the photo identification requirement of SEA 483 will cause none of the Named Individual Plaintiffs any "injury-in-fact," thus depriving them of standing to assert these rights.[57]

b. *Equal Protection Violation.*

The Named Individuals who are without photo identification, however, can assert an equal protection claim on the grounds that they have been disadvantaged relative to certain classes of voters who possess photo identification or are not required to present photo identification. As the Seventh Circuit explained:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury

[57] Democrats also claim that several of the Named Individuals do not want to vote absentee. However, the frustrated desire to vote in person is not an "injury-in-fact" as there is no recognized legal right to vote in the specific manner an individual may prefer. Indeed, were Democrats correct in their theory that there is a constitutional right to vote in person, in Oregon, where everyone votes by absentee ballot, every single Oregon voter would have had their constitutional rights infringed. *See* note 56, *supra.*

> in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 422 F.3d 490, 497 (7th Cir. 2005) (citing *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). Therefore, all the Named Individuals have standing in their own right to bring an equal protection challenge to SEA 483 and the Democrats have standing to assert said rights on their behalf.

C. *Standing of Rep. Crawford and Mr. Simpson.*

Rep. Crawford and Mr. Simpson contend they have individual standing in their own right and standing to assert the rights of voters in their respective constituent districts. We are of the view that Rep. Crawford and Mr. Simpson lack standing both in their own right and in their representative capacities for the reasons we explain below.

1. *Personal Standing*

Both Rep. Crawford and Mr. Simpson already have the photo identification necessary to entitle them to vote in person under SEA 483, although they say they are offended at having to present photo identification. As explained above, the offense they feel does not confer on

them Article III standing. *See,* Legal Analysis Section I(A), *supra.*[58]

Both Rep. Crawford and Mr. Simpson also contend that they risk receiving fewer votes if SEA 483 is enacted; however, this claim has not been supported by any evidence or concrete facts. Their speculations about the impact of SEA 483 do not "establish that they have sustained or are immediately in danger of sustaining some direct injury." *See, e.g., Albiero v. City of Kankakee,* 246 F.3d 927, 933 (7th Cir. 2001) (holding a plaintiff's self-serving statements, unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment); *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994) (stating: "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her."). Thus, Crawford and Simpson have failed to establish that SEA 483 will cause them personally an "injury-in-fact."

2. *Standing Based on Harm to Voters in Their Districts.*

Rep. Crawford and Mr. Simpson also contend they have standing to raise the injuries encountered by voters in their respective districts. With respect to voters who face an insurmountable barrier to obtaining photo identification prior to the election, any injury such voters would

[58] Rep. Crawford and Mr. Simpson would have standing to raise an equal protection claim; however, they did not do so themselves nor do they appear to join in the Democrats' equal protection claim.

suffer as a result of SEA 483 is already identifiable and concrete, and there is no reason to assume they are not able to assert their rights on their own. Moreover, no evidence has been cited that identifies any such voters in either constituency group who stand to be harmed by SEA 483.[59] Rep. Crawford and Mr. Simpson have the burden of establishing the third-party injuries upon which they base their claim of standing, a burden they have failed to meet. Accordingly, Rep. Crawford and Mr. Simpson lack standing to assert the third-party rights of hypothetical voters in their respective districts.

However, as explained in our prior discussion of standing on the part of the Democrats, the situation is slightly different for voters who have secured or could secure the necessary photo identification but, for some reason, may prove unable to present such identification at the polls at the time of voting. Applying the same reasoning, we hold that Rep. Crawford and Mr. Simpson have standing to assert the rights of voters who, through inadvertence, are unable to present photo identification at the polls. *See* Legal Analysis Section I(B)(3), *supra*.[60]

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[59] Rep. Crawford and Mr. Simpson maintain that voters in their districts have told them that they will be unable to vote if they are required to present photo identification. Setting aside the obvious hearsay problem with these statements, neither candidate specifically identified any of these individuals or presented any affidavits in support of his assertion

[60] That said, we remain unclear whether Rep. Crawford and Mr. Simpson are actually raising a claim based on the rights of inadvertently affected voters.

D. *Standing of Organizatior. Plaintiffs*

The Organization Plaintiffs attempt to establish standing to seek relief (1) in their own right, (2) based on the rights of their members, and (3) based on the rights of the individuals they serve. The legal theories upon which the Organization Plaintiffs rely, however, have all been rejected by the Seventh Circuit, making their efforts to convince this court otherwise, at best, an uphill struggle.

1. *Standing in Their Own Right.*

Although the Organization Plaintiffs have not alleged, much less proven, any direct injury to themselves as a result of SEA 483, they argue that they have standing in their own right because, if the law is upheld, it will require them to shift resources away from their existing programs and into efforts aimed at helping voters comply with SEA 483's requirements. This novel interpretation of "direct injury" is, say the Organization Plaintiffs, premised on *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), where the Supreme Court held:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests. We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to

> dismiss for lack of standing the claims of the organization in its own right.

Id. at 379 (footnote and internal citation omitted). However, the reasoning in *Havens* is not applicable to this case for at least four reasons.

First, the organizational standing recognized in *Havens* and its progeny was specifically limited to the context of fair-housing agencies involved in investigating instances of housing discrimination. *See Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1526 (7th Cir. 1990) ("*Havens* makes clear, however, that the only injury which need be shown to *confer standing on a fair-housing agency* is deflection of the agency's time and money from counseling to *legal efforts directed against discrimination.*") (emphasis added); *see, also, Gorski v. Troy,* 929 F.2d 1183, 1188 (7th Cir. 1991) (describing the *Dwivedi* decision as "recogniz[ing] the broad standing principles embodied in the [Fair Housing Act]"). While the Seventh Circuit has continued to apply *Havens* to Fair Housing Act claims, *see City of Chicago v. Matchmaker Real Estate Sales Center, Inc.,* 982 F.2d 1086, 1095 (7th Cir. 1992), our research has not uncovered a single Seventh Circuit case in the nearly twenty-four years since *Havens* was decided by the Supreme Court which applied this analysis outside of the context of housing discrimination; indeed, the Organization Plaintiffs have cited no such decision. Accordingly, there being no support for the Organization Plaintiffs' contention that the Seventh Circuit would extend *Havens* beyond the context of fair-housing agencies investigation housing discrimination, we decline to do so *sua sponte.*

Second, in both *Havens* and *Dwivedi,* plaintiffs had already expended resources in order to investigate and

uncover the defendant's illegal discrimination which allowed the Court to rule that the defendants' discrimination had caused the plaintiffs to suffer an injury in fact. In the case at bar, the Organization Plaintiffs vaguely assert that, as a result of SEA 483, they will, under undefined circumstances in the future, be required to divert unspecified resources to various outreach efforts.[61] Moreover, to the extent that Plaintiffs have already expended resources investigating the impact of SEA 483, such efforts have apparently uncovered no identifiable persons who will be unable to vote, no evidence of racial discrimination, and no convincing evidence of a disproportionate impact on low-income would-be voters. Such imprecise and speculative claims concerning potential future actions designed to combat speculative discrimination are a far cry from the kind of organizational expenditures found to convey standing in *Havens* and *Dwivedi.* Thus, because the alleged actions of the Organization Plaintiffs are not analogous to actions of the fair-housing agencies in *Havens* and *Dwivedi,* we conclude there is no basis for standing here.[62]

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[61] *See, e.g.,* ICLU's Reply Brief at 3-4 (asserting that as a result of SEA 483: "IRCIL will have to devote more of its staffing resource on working with clients to try to collect the information necessary to obtain an identification card. . . . The passage of the Voter ID law will require Concerned Clergy to expend limited financial resources to assist persons with the costs of birth certificates so that they can vote. . . . [The Indianapolis NAACP] Chapter will be involved in educational and outreach efforts to inform the public about the law so as to maximize the number of persons who will be able to vote. These efforts will divert the [NAACP] from engaging in other activities inasmuch as it has limited time and membership resources.") (internal citations omitted).

[62] In addressing this same argument, the D.C. Circuit reached a similar conclusion, observing:

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Third, the claimed injury suffered by the Organization Plaintiffs is entirely of their own making since any future reallocation of resources would be initiated at the Organization Plaintiffs' sole and voluntary discretion. Such an optional programming decision does not confer Article III standing on a plaintiff. As the D.C. Circuit observed: "The diversion of resources . . . might well harm the [plaintiff's] other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff's] own budgetary choices." *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994).

Fourth, the interpretation of *Havens* proffered by the Organization Plaintiffs, if accepted, would completely eviscerate the standing doctrine. If an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a lawsuit. Such an interpretation flies in the face of well-established standing

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> The Court [in *Havens*] did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs. To be sure, the Court did mention the "drain on the organization's resources". Yet this drain apparently sprang from the organization's need to "counteract" the defendants' assertedly illegal practices, and thus was simply another manifestation of the injury that those practices had inflicted upon "the organization's noneconomic interest in encouraging open housing". . . .

Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268, 1277 (D.C. Cir. 1994).

principles. Indeed, "[a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *see also Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78-79 (3d Cir. 1998). We have no indication that either the Supreme Court or the Seventh Circuit is inclined to abolish the standing requirement for federal lawsuits;[63] thus, we decline the Organization Plaintiffs' invitation to do so ourselves.

For these reasons, we conclude that the Organization Plaintiffs lack standing in their own right to challenge SEA 483.

2. *Standing to Represent Their Members.*

The Organization Plaintiffs next claim that they have standing because their members have standing as reflected by evidence they have proffered "demonstrat[ing] that members of each organization are facing injury," ICLU's Reply Brief at 11. However, what the Organization Plaintiffs have presented to the Court in this regard is nothing more than unsupported assertions. None of the Organization Plaintiffs has identified a single member who does not already possess the required photo identification and has an injury beyond "mere offense" at having

[63] To the contrary, the Seventh Circuit recently characterized the standing requirement as "essential and unchanging." *DH2, Inc. v. U.S. S.E.C.*, 422 F.3d 591, 596 (7th Cir. 2005).

to present photo identification in order to vote which, as we have said, does not confer standing. *See* Legal Analysis Section I(A), *supra.* The problem with the Organization Plaintiffs' "standing in [their] representational capacity is that [they have] not alleged, much less proven that any of [their] members or directors either suffered an injury or was threatened with immediate injury to the extent that the member or director would be able to make out a justiciable case had he brought suit himself." *Hope, Inc. v. DuPage County, Ill.,* 738 F.2d 797, 814 (7th Cir. 1984). Since the Organization Plaintiffs have failed to demonstrate "that any party that [they] represent[ ] as a 'member' has standing, [they do] not have standing as that member's representative." *See, also, Fund Democracy, LLC v. S.E.C.,* 278 F.3d 21, 27 (D.C. Cir. 2002) (holding the plaintiff lacked Article III standing because it did "not identify a single affiliate who has invested or is considering investing in Hillview Funds"); *Doe v. Stincer,* 175 F.3d 879, 886-87 (11th Cir. 1999) (explaining: "The right to sue on behalf of its constituents, however, does not relieve the Advocacy Center of its obligation to satisfy Hunt's first prong by showing that one of its constituents otherwise had standing to sue"). Accordingly, the Organization Plaintiffs do not have representational standing to assert their members' rights to challenge SEA 483.[64]

[64] The Organization Plaintiffs would have standing to raise an equal protection claim on behalf of their members; however, they did not raise such a claim themselves and do not appear to have joined in the Democrats' equal protection claim.

3. *Expanded Representational Standing, Including Individuals The Organization Plaintiffs Serve.*

The Organization Plaintiffs attempt to expand their representational capacity by reaching out to include as members all the individuals they serve;[65] however, this approach has been explicitly rejected by the Seventh Circuit. In *Hope, Inc. v. DuPage County, Ill.*, the Seventh Circuit held:

> Amicus curiae attempts to expand HOPE's representational capacity, however, by extending it beyond HOPE's members and directors to all persons for whom HOPE seeks housing. This argument ignores the fact that standing in representational capacity requires that the representative litigate on behalf of members who would have standing in their own right, and furthermore, that the group of low and moderate income persons, for which HOPE seeks housing in DuPage County, are not and cannot be considered members of HOPE. *The Supreme Court has not seen fit to extend representational capacity standing to entities other than associations which actually represent interests of parties whose affiliation with the representational litigant is that of membership with the representative or substantial equivalent of membership.* We likewise decline to further extend representational standing.

Hope, 738 F.2d at 814 (emphasis added). The holding in *Hope* is controlling here: an organization cannot unilaterally expand its representational capacity to include all the

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[65] *See, e.g.*, ICLU's Reply Brief at 10 ("IRCIL considers its members to be the disabled persons to whom it provides services.") (citing Madill Dep. at 19).

individuals it serves. Accordingly, the Organization Plaintiffs lack representational standing to bring this case on behalf of the persons served by them.[66]

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[66] To buttress their contentions, Plaintiffs unconvincingly cite to a line of cases already distinguished by the Seventh Circuit – *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003); and *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999). All of these cases involved legislatively created agencies tasked with representing specific constituencies which were found to be the equivalent of "members." *See Hope*, 738 F.2d at 814 (explaining how in *Hunt*, the "Supreme Court looked to the fact that the Advertising Commission's constituency was effectively the equivalent of 'members' to justify its holding that the Commission had standing as the growers' representative."); *Oregon Advocacy Center*, 322 F.3d at 1110 (holding: "Given OAC's statutory mission and focus under PAMII, its constituents are the functional equivalent of members for purposes of associational standing."); *Doe*, 175 F.3d at 886 (stating: "In a very real sense . . . , as in *Hunt*, the Advocacy Center represents the State's individuals with mental illness and provides the means by which they express their collective views and protect their collective interests.") (internal quotation omitted).

In *Hope*, the Seventh Circuit had the opportunity but declined to expand the *Hunt* reasoning beyond the legislatively created advocacy agencies. Instead, in that case, the Seventh Circuit found that the individuals served by the plaintiff nonprofit advocacy group "are not and cannot be considered members." *Hope*, 738 F.2d at 814. In fact, the Seventh Circuit explicitly rejected the arguments now raised by the Organization Plaintiffs, explaining:

> [R]eliance on *Hunt* for extending the reach of representational standing to those individuals who do not have the characteristics of a member of the representative organization is misguided. In *Hunt*, the Court was faced with a state agency, the Washington State Apple Advertising Commission, which was attempting to litigate on behalf of Washington apple growers. According to the Court, the issue was whether the Advertising Commission's status as a state agency "rather than a traditional voluntary membership organization, preclude[d] it from asserting the claims of the Washington apple growers and dealers who form[ed] its constituency."

Id. (quoting *Hunt*, 432 U.S. at 344)

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Assuming *arguendo* that the Organization Plaintiffs were able to assert representational standing based on the individuals they serve, they still have not made the requisite showing to substantiate their entitlement to standing. Specifically, the Organization Plaintiffs have not been able to provide admissible evidence of any individual who will not be able to vote if required to present a photo identification, let alone to obtain photo identification. The only information provided to the court are the unsubstantiated hearsay statements alleging that unnamed individuals will be burdened by SEA 483; such statements are totally lacking in fending off summary judgment. *See, e.g., Albiero v. City of Kankakee,* 246 F.3d 927, 933 (7th Cir. 2001) (holding that a plaintiff's self-serving statements, unsupported by specific concrete facts reflected in the record, cannot preclude summary judgment); *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994) (stating: "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to

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In the case at bar, none of the Organization Plaintiffs has alleged that it is a legislatively created body specifically charged with representing a certain constituency; therefore, the reasoning in *Hope* is controlling here. Accordingly, the Organization Plaintiffs cannot unilaterally assert representational standing for the individuals they serve.

IRCIL attempts to slide into the *Hunt* exception by stating that it receives federal funding under Title 7 of the Rehabilitation Act, 29 U.S.C. § 796f-4, and that this statute imposes certain concurrent obligations on the organization. However, IRCIL points to no federal statute authorizing it or other such "protection and advocacy organizations . . . to act as agencies to protect and enforce the rights of individuals." *Doe,* 175 F.3d at 886. As such, IRCIL is not the equivalent of the advocacy groups which are permitted representational standing under *Hunt* and its progeny.

find in her favor on a material question, then the court must enter summary judgment against her.").[67]

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[67] Plaintiffs argue they do not have to identify specific individuals whom will be harmed by SEA 483, instead they merely have to demonstrate it is certain that injury will occur. For support, Plaintiffs cite to several the out-of-circuit decisions. *See Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565, 574 (6th Cir. 2004) (holding that although it was inevitable that some voters would be impacted, an individual "voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place."); *Bay County Democratic Party v. Land,* 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (hereinafter "*Bay County*") (explaining "The exact identity of the group of qualified voters who will cast provisional ballots from incorrect polling places, by definition, cannot be known.") *Miller v. Blackwell,* 348 F. Supp. 2d 916, 920 (S.D. Oh. 2004) (relying on *Sandusky* and *Bay County*). There are several reasons why these cases are not persuasive authority for this court. First and foremost, those courts were not bound by controlling Seventh Circuit law. Second, the courts in *Sandusky* and *Bay County* conducted their analysis under the more lenient standards applied to motions for preliminary injunctions and motions to dismiss. Third, based on the nature of the statutes challenged in *Sandusky* and *Bay County,* the courts acknowledged that it was impossible to know prior to the election the identity of which voters would be injured. This is not the situation in the case at bar. Indeed, the Democratic Party has attempted to specifically identify individuals who will be injured by SEA 483 and it appears the Organization Plaintiffs have as well. For these reasons, we decline to adopt the reasoning in these out of circuit cases. The Democrats also cite to the district court case of *Smith v. Boyle,* 959 F. Supp. 982, 985 (C.D. Ill. 1997). However, in *Smith,* the Court found the Chairman of the Illinois Republican Party has standing to sue and, by extension, the Illinois Republican Party, of which he was a member. In the case at bar, Plaintiffs have not identified any of their members who has standing to challenge SEA 483 in his/her own right.

E. *Standing Summary.*

In sum, then, we hold that the Democrats have established standing to assert their own associational rights, the equal protection rights of the Named Individuals, and the rights of voters who through inadvertence will not be able to present photo identification at the polls the day of the election; and that Rep. Crawford and Trustee Simpson have standing to assert the rights of voters who inadvertently cannot present photo identification at the polls. The Organizational Plaintiffs' claims are dismissed for lack of standing to seek the constitutional relief they are claiming.

II. Plaintiffs' Constitutional Challenges to the Photo Identification Requirement

Plaintiffs' basic claim in this lawsuit is that the photo identification requirements of SEA 483 violate the First and Fourteenth Amendments to the U.S. Constitution because they place a severe burden on the right to vote. Because of these burdens, Plaintiffs maintain that the law is subject to strict scrutiny; indeed, nearly all of Plaintiffs' myriad constitutional challenges to the photo identification requirement incorporate some version of their strict scrutiny argument. Plaintiffs, however, have failed to demonstrate that strict scrutiny of SEA 483 is warranted, primarily because they have totally failed to adduce evidence establishing that any actual voters will be adversely impacted by SEA 483. Accordingly, for the reasons explained in detail below, Plaintiffs' constitutional challenge is unavailing.

A. *Background on the Right to Vote and a State's Right to Regulate Elections*

The Supreme Court has recently reiterated this basic democratic principle: "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979)). That said, there is no absolute constitutional right to vote in any specific manner an individual may desire nor is there an absolute right to associate, without restriction, for political purposes through the ballot, *id.* (citing *Munro v. Socialist Workers Party,* 479 U.S. 189, 193 (1986)). The United States Constitution grants "to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 217 (1986). The Constitution itself plainly "compels the conclusion that government must play an active role in structuring elections;" since "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown,* 415 U.S. 724, 730 (1974)); *Tashjian,* 479 U.S. at 217; *see also Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997) (holding "that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."). Pursuant to Art. I, § 4, cl. 1, "state legislatures may, without transgressing the Constitution, impose extensive restrictions on voting." *Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004). A

state's broad authority to regulate elections, however, is tempered by the aforementioned provisions of the Constitution which protect individual citizens' rights; specifically, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . or . . . the freedom of political association." *Tashjian,* 479 U.S. at 217 (internal citation omitted).

In balancing these potentially conflicting constitutional principles:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983); citing *Tashjian,* 479 U.S. at 213-14). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons,* 520 U.S. at 358-59 (quoting *Burdick,* 504 U.S. at 434; *Anderson,* 460 U.S. at 788; *Norman v. Reed,* 502 U.S. 279, 288-89 (1992)). Unfortunately, "no bright line separates permissible election-related regulation from unconstitutional infringements

on First Amendment freedoms." *Timmons,* 520 U.S. at 359 (internal citation omitted).

B. *Standard of Review in passing on the constitutionality of SEA 483*

We begin by noting that Plaintiffs' arguments proceed from the oft-criticized, but nonetheless frequently invoked, "erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick v. Takushi,* 504 U.S. 428, 432 (1992).[68] As the Supreme Court explained in *Burdick*:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling

[68] *See, e.g.,* Democrats' Brief in Supp. at 28 ("As the most elemental expression of civic participation, and the most prominent self-correcting feature of our form of government, any governmental activity which impedes or burdens the right to vote can survive only if the challenged law or procedure both promotes a compelling state interest and is narrowly tailored to achieve that compelling interest."); and ICLU's Reply Brief at 26 ("Given that the statute will prevent some persons from being able to vote and will erect barriers against others, it is clear that the law does impose a serious burden on the right to vote . . . if the right to vote is severely burdened, the regulation can be upheld only if it is narrowly drawn to support a compelling state interest.")

> state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Id. at 433. Similarly, strict scrutiny of an election law is not warranted merely because it may prevent some otherwise eligible voters from exercising that right. As the Seventh Circuit observed: "Any [election] restriction is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004) (citing *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358-59 (1997); *Burdick v. Takushi,* 504 U.S. 428, 438-42 (1992); *Nader v. Keith,* 385 F.3d 729 (7th Cir. 2004); *Libertarian Party v. Rednour,* 108 F.3d 768, 773 (7th Cir. 1997); *Werme v. Merrill,* 84 F.3d 479, 483-84 (1st Cir. 1996)).

1. *Strict Scrutiny of SEA 483 Is Not Warranted*

Strict scrutiny means "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Burson v. Freeman,* 504 U.S. 191, 198 (1992) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45 (1983); citing *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 800 (1985); *United States v. Grace,* 461 U.S. 171, 177 (1983)).

In arguing that SEA 483 should be subject to strict scrutiny, Plaintiffs face enormous challenges based on the evidence they have submitted to the court. In particular,

Plaintiffs have failed to submit: (1) evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote. Instead, they have concentrated their evidence and arguments on the burdens of obtaining a driver's license or identification card from the BMV, which matter is ultimately irrelevant in this case because of (1) and (2) above. Accordingly, Plaintiffs have not demonstrated that SEA 483 will impose severe burdens on the rights of voters, thereby rendering strict scrutiny unwarranted. We now address each of these points:

a. *Plaintiffs have presented no evidence of any individuals who will be severely burdened by this law.*

Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to SEA 483 because of his or her inability to obtain the necessary photo identification. Similarly, Plaintiffs have failed to produce any evidence of any individual, registered or unregistered, who would have to obtain photo identification in order to vote, let alone anyone who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote. In contrast to any reliable, specific evidence, nearly all of the original ICLU Plaintiffs assert that they know of people (or know of people who

know of people) who claim they will not be able to vote as a result of SEA 483.[69] But, *none* of these allegedly affected individuals has been identified by name, let alone submitted an affidavit.[70] The Democrats, for their part, submitted the names of several individuals who they claim would be unable to vote as a result of SEA 483; however, each and every one of the individuals identified by the Democrats is either eligible to vote absentee, already had acceptable photo identification or could obtain acceptable photo identification if needed.[71]

Plaintiffs' inability to provide the names or otherwise identify any particular affected individuals persists despite various polls and surveys that were conducted for the specific purpose of discovering such individuals. The Democrats' failure in this regard is particularly acute in light of their assertion that nearly one million of Indiana's

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[69] *See* ICLU's Brief in Supp. at 13-14, 24-28.

[70] Kristjan Kogerma submitted an affidavit asserting that he was unable to obtain an identification card from the BMV because he is homeless and thus "did not have anything on it with proof of my address." Kogerma Aff. at ¶¶ 6, 8. Mr. Kogerma's affidavit is problematic for three reasons: First, there is no indication that Mr. Kogerma is registered to vote in Indiana or has any intention to do so. Second, assuming Mr. Kogerma is registered to vote in Indiana, his voter registration card can serve as proof of his Indiana residency. Third, if Mr. Kogerma is indigent, as his homeless status would suggest, he is explicitly exempted from the photo identification requirement of SEA 483.

[71] There is no evidence that voting absentee would be a burden or hardship for any of these individuals; indeed, three of the Named Individuals disclosed they had voted absentee in past elections. As discussed above, several of the Named Individuals apparently do not wish to vote absentee; however, this abrogation of their personal preferences is not a cognizable injury or hardship.

registered voters do not possess an Indiana driver's license or photo identification.[72]

We do not doubt that such individuals exist somewhere, even though Plaintiffs were unable to locate them. However, it is a testament to the law's minimal burden and narrow crafting that Plaintiffs have been unable to uncover anyone who can attest to the fact that he/she will be prevented from voting despite the concerted efforts of the political party and numerous interested groups who arguably represent the most severely affected candidates and communities. Lacking any such individuals who claim they will be prevented from voting, we are hard pressed to rule that SEA 483 imposes a severe burden on the right to vote. To the contrary, we conclude that Plaintiffs' lack of evidence confirms that SEA 483 is narrowly tailored because every hypothetical individual who Plaintiffs assert would be adversely affected by the law actually benefits from one of its exceptions.

b. *Plaintiffs have not presented statistical evidence of any groups who will be severely or disproportionately burdened.*

Plaintiffs' efforts to introduce statistical data about the number of affected individuals is similarly unavailing. On the one hand, the conclusions of the "expert" report commissioned by the Democrats to account for the number of registered voters without an Indiana driver's license or

[72] As we discuss in Factual Background Factual Background Section VII, *supra*, support for the Democrats' assertion comes from the report of their expert, Kimball W. Brace, whose analysis and conclusions we deemed so utterly unreliable that we omitted them from consideration in reaching our decision.

identification card are totally unreliable, *see* Factual Background Section VII, *supra*. To the extent that the Brace report reveals anything relevant, it is limited to the fact that the vast majority, which is to say up to 99%, of Indiana's registered voters already possess an Indiana driver's license or an identification card. On the other hand, the ICLU Plaintiffs have submitted the results of polls and surveys, some of them admittedly very informal and unscientific, which purport to establish the impact of SEA 483 on various groups, such as the homeless, low-income, elderly and disabled. However, none of these polls or surveys actually indicates that SEA 483 imposes a severe burden on the rights of the voters in these groups. At best, the ICLU Plaintiffs' information reveals that several groups which are not required under SEA 483 to obtain photo identification in order to vote would be burdened to some extent if they were required to do so.[73]

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[73] The closest any verifiable poll comes to discussing the impacts of SEA 483 is from AARP Indiana, which represents that 97% of its members over the age of 60 already had acceptable photo identification in order to vote. This poll, however, is tangential to the issues in this case since the elderly are automatically entitled to vote absentee under Indiana law. Ind. Code § 3-11-10-24(a)(5) (the State suggests the word "elderly" refers to individuals over the age of 65, *See* State's Brief in Supp. at 34). Similarly, the IRCIL reported that, although an estimated 10%-15% of its members expressed general concerns about SEA 483, none of its members indicated they would be unable to vote as a result of the legislation. *See* Madill Dep. at 11. Moreover, even if members of the IRCIL had indicated they would be unable to vote in person as a result of SEA 483, the disabled are also entitled to vote absentee under Indiana law, *see* Ind. Code § 3-11-10-24(a)(4). Finally, the ICHHI conducted a survey of its members asking, through very leading questions, if they knew of homeless individuals without photo identification and if they were aware of various difficulties homeless individuals face with respect to obtaining photo identification. *See* Reinke Dep., Att. # 3. We are not sure what to make of this survey, beyond the obvious hearsay-within-hearsay-within-hearsay problems since, there is

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Plaintiffs, therefore, have not provided the Court with any evidentiary basis on which to conclude that the rights of Indiana voters, let alone any particular disadvantaged segment of the population, will be severely burdened by the requirements of SEA 483.

c. *Plaintiffs' arguments concerning the difficulty of obtaining photo identification are similarly unavailing.*

Plaintiffs have included voluminous argument and discussion in their submissions describing the requirements for obtaining photo identification from the BMV and demonstrating that they are "an onerous and expensive burden for some voters and an impossible one for others."[74] However, we have no evidence before us that any individual or groups will be required to undertake this "onerous and expensive burden" in order to vote. As previously noted, the vast majority of Indiana's voting age population already appears to possess a driver's license or identification card; thus, SEA 483 cannot be deemed to impose any new burdens on these voters in order to vote. Moreover, the individuals and groups that Plaintiffs contend will be disproportionately impacted by SEA 483 all appear fully capable of availing themselves of the law's exceptions so that they do not need to obtain photo identification in order to vote. Thus, there is no basis to attribute

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no discussion of whether any of the affected individuals are registered to vote, intend to register to vote, or would qualify for the indigent exception, as their homeless status would suggest.

[74] ICLU's Brief in Supp. at 1.

or extend the burdens of obtaining a driver's license or identification card from the BMV to the act of voting.[75]

Accordingly, we conclude that SEA 483's photo identification requirement for in-person voting does not impose a severe burden on the right to vote, thus removing the necessity to subject the law to strict scrutiny.

C. *Reasonable Justification for SEA 483's Photo Identification Requirement.*

Having determined that strict scrutiny is not warranted, "the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004). The State argues that it has a recognized interest in ascertaining a voter's identity and discouraging voter fraud which interest fully justifies the photo identification requirements of SEA 483.

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[75] We do not doubt that there might be registered voters who do not qualify for any exceptions and, thus, will have to obtain photo identification in order to vote. However, the mere fact that a voting regulation excludes some voters is not enough to warrant strict scrutiny. *Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004). Moreover, any analysis we might attempt to undertake involving such individuals would be purely speculative since no admissible evidence as been adduced to establish their numerosity or even their existence. These failures of proof vividly illustrate the importance of Article III standing: instead of waiting for truly aggrieved parties to bring a lawsuit to redress their real injuries, Plaintiffs have saddled the Court with a weakly conceived lawsuit brought by parties most of whom only marginally satisfy the standing requirements but all of whom obviously strongly dislike the challenged law for partisan and/or personal reasons. As a result, the Court has been repeatedly required to respond to vague hypotheticals and speculation rather than concrete and actual harms.

It is beyond dispute that Indiana has a compelling interest in ascertaining an individual's identity before allowing the person to vote.[76] It is also well-established that Indiana has an important interest in preventing voter fraud. As the Supreme Court has observed:

> It cannot be doubted that these comprehensive words [of Article I § 4] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to . . . *prevention of fraud and corrupt practices* . . . to enact the numerous requirements as to procedure and safeguards which experience shows as necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added). Moreover, in examining an election regulation aimed at combating fraud, courts are well advised to pay additional deference to the legislative judgment because "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas,* 385 F.3d 1128, 1131 (7th Cir. 2004).

We have no basis to conclude that the General Assembly's legislative judgment in enacting SEA 483 was grossly awry. The State Legislature sought through this statute to advance the interest of combating voter fraud by requiring that in-person voters present a form of photo identification that virtually all registered voters already possess. The

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[76] *See, e.g.,* ICLU's Reply Brief at 27 (conceding that "protecting against fraud is an important, if not compelling, interest in general").

State repeatedly notes in defending its enactment that presentation of photo identification is routinely required for a multitude of everyday activities – from boarding a plane, entering a federal building, to cashing a check.[77] The incontrovertible fact that many public and private entities already require individuals to present photo identification substantially bolsters the State's contention that "[a]mong all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity." State's Brief in Supp. at 23.

We therefore accept and concur in the State's "important regulatory interest" in combating voter fraud and find it sufficient to justify the "reasonable, nondiscriminatory restrictions" contained in SEA 483. *See Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358-59 (1997).

Plaintiffs' response to the State's justification for the voter identification requirements has been that there are no documented cases of in-person voter impersonation in Indiana; that argument misses the point, however, because the State is not required to produce such documentation prior to enactment of a law. The Supreme Court has stressed that there is no requirement of "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997); *See also Munro v. Socialist Workers Party,* 479 U.S. 189, 195-196 (1986) (noting: "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight

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[77] *See* State's Ex. 1 at 18; *see also* Legal Analysis Section VIII(A), *infra* (discussing Plaintiffs' Motion to Strike this evidence).

rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

Assuming *arguendo* that the State was required to empirically substantiate its justification for SEA 483, in our view it has clearly done so. The State cites incidents of reported in-person fraud in recent elections in Florida, Georgia, Missouri, New York, Washington, and Wisconsin as well as reports of individual voters using the names of dead persons, according to published reports in Georgia, Illinois, Maryland, Missouri, Pennsylvania, and Wisconsin.[78] The State also points to the findings of the Barker-Carter Commission which found that "fraud and multiple voting in U.S. elections" occurs and that such fraud "could affect the outcome of close elections." State's Ex. 1 at 18. Both parties have submitted evidence in this case which indicates that Indiana's voter rolls are significantly inflated,[79] thereby increasing the opportunity for in-person voter fraud to occur. Finally, as the State maintains, without a photo identification requirement it is nearly impossible to detect in-person voter impersonation. These factual assertions sufficiently establish a justification on the part of the Indiana General Assembly to enact the photo identification requirements in SEA 483.

D. *SEA 483 Is Not a Poll Tax.*

Plaintiffs also contend that SEA 483 is unconstitutional because the photo identification requirement essentially

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[78] *See* State's Exs. 3-18.

[79] *See, e.g.*, State's Ex. 27; discussion of Brace Report contained in Factual Background Section VII, *supra*.

constitutes a poll tax. According to Supreme Court precedent, "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 666 (1966) (footnote omitted).

We do not view the photo identification requirement of SEA 483 to be a "poll tax." Importantly, under Ind. Code § 9-24-16-10, the BMV "may not impose a fee for the issuance of [an original, renewal, or duplicate] identification card to an individual . . . who . . . does not have a valid Indiana driver's license . . . and . . . will be at least eighteen (18) years of age at the next general, municipal, or special election." Thus, by statute, any individual who meets the age eligibility requirement to vote can obtain photo identification from the BMV without paying a fee.[80]

Plaintiffs also contend that all manner of incidental costs incurred in the process of obtaining the photo identification required by SEA 483 constitute a poll tax. For example, according to the Democrats,

> [T]he other incidental but nonetheless real and substantial costs . . . [include] the cost in time and of transportation, especially to those without driver's licenses, who will have to either use public transportation (for a fee) to travel to the BMV location, quite possibly after a trip to the health

[80] The fee imposed on individuals to obtain a driver's license is a fee for the privilege of driving, not for identification, and if an individual no longer wishes to enjoy the privilege of a driver's license, he/she can obtain an identification card for free.

> department to obtain (for a fee) a certified copy of a birth certificate, not to mention the additional costs in time and money for voters who were born in other states.

Democrats' Reply Brief at 21. *See also* ICLU's Brief in Supp. at 29 (mentioning "other costs, such as those for procuring a birth certificate, and transportation costs that will be incurred as a prerequisite to voting").

This argument represents a dramatic overstatement of what fairly constitutes a "poll tax." It is axiomatic that "(e)lection laws will invariably impose some burden upon individual voters," *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. Moreover, the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because these same "costs" also result from voter registration and in-person voting requirements, which one would not reasonably construe as a poll tax. Plaintiffs provide no principled argument in support of this poll tax theory.

The only incidental cost which might plausibly approach being a poll tax is the fee assessed to obtain a birth certificate, which in turn is used to obtain a photo identification from the BMV. Even here, however, Plaintiffs' argument falls short for several reasons. First, Plaintiffs' contention about the need for individuals to pay a fee for a birth certificate is purely speculative and theoretical, since they have provided no evidence to demonstrate that anyone will actually be required to incur this cost in order to vote. Indeed, the evidence suggests to the contrary – that the vast majority of Indiana's voting age population will not have to obtain a birth certificate since they already possess acceptable photo identification. Second,

Plaintiffs' argument completely ignores the fact that SEA 483 permits individuals desiring to vote in-person to present a valid federal identification, e.g. passport, whose requirements to obtain, including any incidental fees, are beyond the control of the State. Third, Plaintiffs' argument overlooks the fact that a valid birth certificate is only one of the primary documents acceptable to the BMV; individuals can present various documents for that purpose, some of which are again issued by the federal government whose requirements and incidental fees are beyond the control of the State. In light of these facts, we shall not prolong this part of our analysis in an effort to determine whether the cost of obtaining a birth certificate is sufficiently tied to the requirements of voting as to constitute a "poll tax." We hold that it does not.

E. *Incidental Impact on Voters Who by Inadvertence Cannot Present Photo Identification.*

The Democrats argue that SEA 483 is unconstitutional because it burdens the right to vote of a person who, through no fault of his own, may be prevented from presenting acceptable photo identification at the polls on election day. Examples of such fate-stricken voters, they say, would include someone who –

> has recently been the victim of identity fraud or her driver's license may have been stolen, or her personal records destroyed in a fire, hurricane, tornado, or other natural disaster. Or the voter may simply be unaware of the Law's stringent new identification requirements or simply forgot to bring her identifying documents to the polls so near to 6:00 p.m. as to eliminate the possibility of retrieving it before the 6:00 p.m. poll closing.

Democrats' Reply Brief at 34. If these hypothetical situations materialized, they would obviously be unfortunate, but in no event would they rise to the level of a constitutional violation because "unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection." *Griffin v. Roupas,* 385 F.3d 1128, 1132 (7th Cir. 2004) (citing *Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.,* 964 F.2d 1556, 1569 (5th Cir. 1992); *Smith v. Boyle,* 144 F.3d 1060, 1064 (7th Cir. 1998); *Bell v. Duperrault,* 367 F.3d 703, 712 (7th Cir. 2004) (concurring opinion)). Moreover, none of the hypothetical, would-be voters conjured up by the Democrats would be prevented by SEA 483 from voting, given that all would be permitted to vote through a provisional ballot, after which they would have approximately two weeks to obtain photo identification, appear before the circuit court clerk or county election board, and have their provisional ballot validated. There is no constitutional concern here deserving of a remedy, based on such incidental impact on voters.

F. *Reasonable Alternatives to Presentation of Photo Identification.*

Curiously, the Democrats include the argument that the Voter ID law is unconstitutional due to "the absence of any reasonable alternative to its stringent photo identification requirements such as would permit a voter without one of the narrow forms of identification to exercise his or her right to vote notwithstanding." Democrats' Reply Brief at 31. The Democrats base this contention on precedent, saying: "In an analogous context, the Supreme Court has twice held that restrictive ballot access laws for candidates must contain a reasonable alternative for those candidates

who, because of their poverty, cannot afford to pay the costs associated with running for office." Democrats' Reply Brief at 31.

This argument is misguided for three reasons. First, besides the obvious fact that the quoted Supreme Court holding pertains to candidates rather than voters, every individual whom the Democrats identified as unable to vote as a result of SEA 483 was determined, upon examination, to be eligible to vote absentee, and the Democrats have not presented any evidence to prove that voting absentee would be a hardship on any of these voters. Second, the groups that Plaintiffs claim would be disproportionately impacted, such as the elderly, disabled, and homeless, can all avail themselves of permissible alternatives to the photo identification requirements.[81] Third, SEA 483 contains an explicit exception for indigents.[82] Accordingly, we hold the Democrats' arguments based on the lack of a safety valve to the photo ID are unpersuasive and not supported by applicable precedent.

G. *Existence of Legislative Alternatives.*

Plaintiffs expend considerable effort in their briefs explaining that there exist effective alternatives to requiring photo identification that the General Assembly could have adopted and that there are additional potential avenues of voter fraud that the General Assembly failed to

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[81] *See* Ind. Code § 3-11-10-24 (listing the classes of voters entitled to vote by absentee ballot).

[82] *See* Ind. Code § 3-11.7-5-2.5(c)(2).

address with SEA 483.[83] These arguments are not relevant, never mind persuasive in view of the fact that the legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them. The Supreme Court could not be clearer than it was in *Williamson v. Lee Optical of Oklahoma*:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here.

348 U.S. 483, 489 (1955) (internal citations omitted).

Plaintiffs have made it abundantly clear that in-person voter fraud is not a problem they would have chosen to address had they been in position to substitute their judgment for that of the General Assembly, and, in fact, had they chosen to address this problem at all, they would not have resolved it by requiring the presentation of photo identification. Plaintiffs must live with their

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[83] *See, e.g.*, ICLU's Reply Brief at 28-29 ("But, the point is that the State has chosen to put onerous conditions on the area of voting in-person, where there is absolutely no evidence of fraud, while ignoring fraud prevention procedures in the area of voting absentee, where there is documented proof of fraud. Moreover, the statute dispenses with signature comparison as a fraud safeguard for in-person voters, while trumpeting its utility to detect fraud in the absentee voting area.")

frustrations, however, because these are policy determinations the General Assembly is empowered to make and Plaintiffs' strong desire for a different result does not translate into a constitutional violation.

H. *"Cumulative Burdens" Imposed by Other Voting Statutes.*

The Democrats next urge the Court to examine SEA 483 in the context of "the cumulative burdens imposed by the overall scheme of electoral regulations on the rights of voters and political parties. . . ." Democrats' Brief in Supp. at 43. They attempt to buttress this part of their attack on the statute through a litany of Indiana election law provisions with which they also take issue, including: registration deadlines, polling hours, partisan challengers, absentee balloting restrictions, partisan officials administering the election system, the percentage of provisional ballots counted, as well as recent closings of BMV offices. None of these statutes or practices is at issue in this litigation, however, and the Democrats have made little or no effort to explain how these otherwise unrelated statutes and procedures are relevant to our analysis of SEA 483.[84] This "cumulative burdens" argument resembles the college

[84] At least one of the Democrats' cited examples is also based on an obvious misreading of the Indiana Code. The Democrats assert that "Indiana voters desiring to vote absentee are now required for the first time to swear under oath that he or she 'has a specific reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.'" Democrats' Brief in Supp. at 45 (quoting Ind. Code § 3-11-10-24(a)(1); citing Robertson Dep. at 16-17). However, Ind. Code § 3-11-10-24(a), as Ms. Robertson correctly explained in her deposition, actually requires voters to satisfy only one of ten criteria, the first of which references being absent for all twelve hours that the polls are open.

student "wet Kleenex" prank of yore in which as entertainment, a soggy wet tissue mass is thrown against the dorm room wall to see if it will stick. In the context of this much more serious matter, we fear Plaintiffs are engaged in a similar exercise – throwing facts against the courthouse wall simply to see what sticks. For clarity, we repeat: To the extent any of the individual issues are relevant, we have previously taken them into account in their more appropriate analytical context; otherwise, they lack sufficient substance to warrant further discussion.

Conclusion: The Photo Identification Requirement of SEA 483 is Constitutional.

For the reasons explained above in subsections A-H, we hold that the photo identification requirements imposed by SEA 483 are constitutionally permissible State regulations of elections.

III. Equal Protection Clause Claims.

The Democrats raise two principal equal protection arguments in their challenge to SEA 483's photo identification requirement exceptions, to wit, the absentee ballot exception and the nursing home exception.[85] Neither of

[85] The Democrats' also contend that the indigent exception violates the Equal Protection Clause; more precisely, however, this claim is actually a unconstitutional vagueness challenge. *See* Democrats' Reply Brief at 37 (arguing SEA 483 "violate[s] the Equal Protection Clause by discriminating against voters . . . to whom the Law gives no standards for determining whether they are 'indigent' and who will thus be unwilling to risk criminal prosecution for perjury in order to have their vote counted.") The vagueness challenge to the indigent exception is dealt with in Legal Analysis Section IV(A), *infra*. The League of Women Voters (the "LWV") also challenges the exception for individuals who

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these equal protection challenges is ultimately persuasive, however, for the reasons explained below.

A. *Absentee Ballot Exception.*

The primary equal protection challenge advanced by Plaintiffs is that, because SEA 483 does not apply to absentee voters, it is discriminatory and thus violative of the Equal Protection clause of the Fourteenth Amendment.[86] This argument downplays the obvious fact that absentee voting is an *inherently* different procedure from in-person voting. Indeed, it is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters. Not surprisingly, the Democrats cannot cite to a single case in support of their contention that a state may not impose different requirements on absentee and in-person voters,[87] nor do the Democrats challenge Indiana's

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refuse to be photographed for religious reasons, contending that it is unduly burdensome, in that each time, such voters must vote by provisional ballot and then, separately, fill out an affidavit before the clerk of the court or the election board. We did not consider this argument because (1) it was not adopted by any of the Plaintiffs in this case; (2) it is not clear the LWV or any of the Plaintiffs have standing to raise such a challenge; and (3) there is no evidence before the court of any individuals holding such religious beliefs, so the challenge is purely hypothetical, insofar as the record of this case is concerned.

[86] *See, e.g.,* Democrats' Brief in Supp. at 37 (arguing "these exceptions violate the Equal Protection Clause by discriminating against voters who do not or cannot cast an absentee ballot. . . ."). We return to this issue again in Legal Analysis Section VI, *infra* of this opinion.

[87] Democrats cite *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) for the following proposition: "The government may not enact barriers making it more difficult for members of one group to

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authority to allow for absentee voting or Indiana's limitation on the classes of voters who are permitted to vote absentee. Accordingly, the mere fact that SEA 483's photo identification requirements apply only to in-person voters and not to absentee voters does not offend the Equal Protection clause.

Even assuming that SEA 483 violated the Equal Protection clause, the State has provided an eminently reasonable explanation for this exception: "[E]lection officials would have no way to compare photo identification included with an absentee ballot . . . with the face of the person who actually marked the ballot;" thus "[r]equiring voters to include a photocopy of the identification would . . . have little, if any, benefit in terms of fraud prevention and detection." State's Reply Brief at 23-24. While the Democrats question the logic of this explanation,[88] they have not presented any evidence or argument

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obtain a benefit (or exercise a fundamental right) than for members of other groups." Democrats' Brief in Supp. at 37. This case, however, merely discusses the requirements for Article III standing in an Equal Protection case. Similarly, none of the other cases cited by the Democrats remotely pertains to the issue of the constitutional acceptability of different standards for absentee and in-person voters. *See Reform Party of Allegheny Co. v. Allegheny Co. Dept. of Elections*, 174 F.3d 305, 315-18 (3rd Cir. 1999) (en banc) (invalidating statute precluding cross-endorsements only for minor party candidates); *Rockefeller v. Powers*, 74 F.3d 1367, 1377 n.16 (2nd Cir. 1995) (upholding a law setting minimum signature requirements for national convention delegates to be eligible for the ballot); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1223 (4th Cir. 1995) (discussing a ballot access provision which requires a party receive a minimum percentage of the popular vote to remain on the ballot).

[88] *See, e.g.*, Democrats' Brief in Supp. at 21 (arguing that "it is particularly odd that the [Voter] ID Law expressly exempts the one method of voting that has experienced documented instances of fraud"

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suggesting that, in not applying the photo identification requirement to absentee voters, the Indiana General Assembly was motivated by discriminatory animus. Accordingly, we find the State's explanation for the absentee ballot exception to be self-evident and non-discriminatory and, thus, overcomes any Equal Protection concerns.

Plaintiffs contend further that absentee voting is a less desirable to in-person voting and one that is imposed unfairly on individuals who do not have photo identification. Again, there is a total lack of any evidentiary support for this contention, despite Plaintiffs' reliance on a district court decision in *Common Cause/Georgia v. Billups,* 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (hereinafter "*Common Cause*").[89] The *Common Cause* decision, however, is not only not controlling precedent here; the decision's analysis is not even relevant to the case at bar for the following reasons: (1) The *Common Cause* decision involves an analysis of *Georgia's* absentee voter laws and Plaintiffs have not troubled themselves to establish that *Indiana's* absentee voter laws are comparable to Georgia's; (2) The *Common Cause* decision was a ruling on a preliminary injunction, which, of course, presents different evidentiary

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and that "it was wholly irrational . . . for the Indiana General Assembly to have excluded absentee voters")

[89] Plaintiffs both principally cite the following passage:

> the Court finds that absentee voting simply is not a realistic alternative to voting in person . . . for most voters who lack Photo ID. The fact that voters, in theory, may have the alternative of voting an absentee ballot without a Photo ID thus does not relieve the burden on the right to vote caused by the Photo ID requirement.

Id. at 1365 (quoted in part at Democrats' Reply Brief at 36; ICLU's Reply Brief at 28).

standards than those on summary judgment; (3) The Court, in *Common Cause*, expressly based its ruling on several factual findings and assumptions for which there is no evidentiary basis in this case;[90] (4) One of the concerns expressed in the *Common Cause* decision was that Georgia had recently changed its absentee voter requirements but had not publicized the change,[91] and there is no evidence in this case that such circumstance pertains here. The *Common Cause* decision well illustrates the types of evidence and arguments that Plaintiffs in the case at bar could have presented concerning Indiana's absentee voter requirements but regrettably failed to adduce. There being no basis on which to conclude that absentee voting is an unacceptable alternative for individual voters lacking photo identification, we reject this equal protection challenge to SEA 483.

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[90] *See, e.g., Id.* at 1364-65 ("The majority of voters – particularly those voters who lack Photo ID – would not plan sufficiently enough ahead to vote via absentee ballot successfully. In fact, most voters likely would not be giving serious consideration to the election or to the candidates until shortly before the election itself. Under those circumstances, it simply is unrealistic to expect that most of the voters who lack Photo IDs will take advantage of the opportunity to vote an absentee ballot.") There is no basis in the record before us to make similar assumptions or findings here.

[91] *Id.* at 1364 ("Absent more information indicating that the State made an effort to inform Georgia voters concerning the new, relaxed absentee voting procedures, many Georgia voters simply may be unaware that the rules have changed. . . . Consequently, the Court simply cannot assume that Georgia voters who do not have a Photo ID will make the arrangements necessary to vote via the absentee voting process.")

B. *Nursing Home Exception.*

The Democrats also maintain that the nursing home exception violates the Fourteenth Amendment's Equal Protection clause, claiming that they "can conceive of no rational purpose for this disparate treatment, much less any compelling state interest" to justify the exception. Democrats' Brief in Supp. at 39. The State counters this challenge, arguing that the nursing home exception is supported by several "self-evident realities."

We pause briefly to note that our determination of the constitutionality of the nursing home exception, once again, is limited by the parties' sparse briefing; to further illustrate the difficulties imposed on the Court in this regard, the two above-quoted statements are the extent of the parties' arguments regarding the constitutionality of this exception. The Democrats have not cited to a single case discussing the constitutional limitations on a state imposing different requirements or procedures for different classes of voters[92] nor do they discuss the issue of severability.[93] Instead, the Democrats attempt to bootstrap their objections relative to the nursing home exception

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[92] *See* note 87, *supra* discussing the equal protection cases cited by the Democrats.

[93] *See* Ind. Code § 1-1-1-8(b) (providing: "Except in the case of a statute containing a nonseverability provision, each part and application of every statute is severable. If any provision or application of a statute is held invalid, the invalidity does not affect the remainder of the statute . . . "); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1004 (7th Cir. 2002) (explaining "the severability clause can save the constitutionally viable remainder only if the invalidated elements were not 'an integral part of the statutory enactment viewed in its entirety.'") (quoting *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985)).

into a basis for invalidating the entirety of SEA 483.[91] We are unclear from the Democrats' briefs whether their equal protection challenge to the nursing home exception survives our previous ruling that the photo identification requirements of SEA 483 are constitutional. Despite these adversarial failings, we turn our attention to the Democrats' contention that there is no "rational purpose" supporting the nursing home exception.

A straightforward reading of SEA 483 reveals that the Indiana General Assembly selected for exception from the statute's requirements a discrete and identifiable category of voters whose ability to obtain photo identification is particularly disadvantaged but for whom sufficiently reliable methods of verifying their identification otherwise exist. Our examination of the record reveals no hint of discriminatory intent in the General Assembly's action; instead, we find convincing evidence of a good faith

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[91] *See, e.g.*, Democrats' Brief in Supp. at 37 ("To avoid strict scrutiny, the restrictions imposed by an election law must be both reasonable and non-discriminatory"); and at 39 ("This exception violates the Equal Protection Clause and further demonstrates the unfairness and irrationality of the Photo ID Law"). The ICLU Plaintiffs attack the nursing home exception in the same manner. *See, e.g.*, ICLU's Reply Brief at 21 (arguing that "the identification requirement as imposed by the Voter ID law is certainly not a material requirement. . . . For the nursing home voter, faith that the poll workers will recognize them is deemed to be sufficient. Yet, neither personal recognition nor signature is sufficient for those other voters voting in-person. Clearly, the specific identification requirement imposed by the challenged statute cannot be deemed to be material.")

Plaintiffs' strategy is a non-starter since we would not invalidate an otherwise constitutional statute simply because one of its severable exemptions might be unconstitutional; to the contrary, we would, in all likelihood, find the statute constitutional and sever the unconstitutional portion.

attempt to facilitate disadvantaged voters without compromising the voter fraud prevention intent which underlies SEA 483. As we have previously noted, "[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas,* 385 F.3d 1128, 1131 (7th Cir. 2004). Given the unique confluence of these factors, we are firmly convinced that the Indiana General Assembly was well within its powers to create a reasonable, limited exception to the photo identification requirements for nursing home residents without running afoul of the 14th Amendment.

This conclusion is premised on self-evident facts, particularly that individuals residing in nursing homes require the substantial assistance of others for their daily care; indeed, that is the very reason that most, if not all, individuals enter a nursing home. Also, due to their infirmed circumstances, it is reasonable to assume that nursing home residents are limited with respect to their ability to travel to a BMV location to obtain photo identification. It is also reasonable to assume that many nursing home residents would require some form of assistance from third parties, such as the facility's staff, in order to vote in-person (or even vote absentee for that matter). Thus, it is also reasonable to assume that on election day there would be nursing home staff present in the polling area to assist residents to vote. In addition, because of age and infirmity, the vast majority of nursing home residents are publically supported (e.g. Medicare, Medicaid, Social Security) or have private insurance and, in order to obtain that financial support, nursing home residents would have

established their identity to the nursing home and to their benefits provider through some form of certifiable identification process.[95] Consequently, the nursing home officials would have intimate, objective, and verifiable information concerning the identity of its residents. When a polling center is located within easy access of nursing home residents, such as in the nursing home facility itself, it is entirely reasonable to assume that there will be neutral third parties available who can readily vouch for a resident's identity. In creating this exception for residents of nursing homes, the State's stated purpose of combating voter fraud is not undermined since there are sufficient guarantees of identity of the voter to exempt them from presenting photo identification.[96]

Plaintiffs' repeated claim that the nursing home exception is discriminatory because it excludes other groups of individuals whom Plaintiffs contend are similarly situated ignores the justifications for the nursing home exception.[97] Nursing home residents represent a

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[95] Moreover, as the executive director of USA noted, "it is not uncommon for disabled persons living in some type of congregate living situation run by a private company to have their identification kept by the company so that the individual is not able to obtain his or her identification card even if one has been issued." ICLU's Brief in Supp. at 20 (citing Madill Dep. at 26-29).

[96] *See also* State's Brief in Supp. at 29 (discussing other facts supporting the nursing home exception).

[97] For example, Plaintiffs cite one Ernest Pruden, who works at the polls located in his apartment building but who will not be able vote there in person without presenting photo identification. While Mr. Pruden's situation is certainly analogous in some respects, there is no evidence to indicate that Mr. Pruden has any reason to prove his identity to the other individuals living in his apartment building, that any such individuals would be present at the polls at the time of voting, or that Mr. Pruden is infirmed or otherwise disadvantaged.

discrete and readily identifiable category of voters whose ability to obtain photo identification is particularly disadvantaged, whose qualification for the exception (residing in a nursing home) is not readily susceptible to fraud, and for whom there otherwise exist sufficiently reliable methods of verifying identification. Plaintiffs' feeble effort simply to match one or more of these explanations to a voter who is not eligible for an exemption does not establish that the nursing home exception is discriminatory or unconstitutional.

Accordingly, the Democrats' equal protection challenge to the nursing home exception is denied.

IV. Unconstitutional Vagueness Claims.

The Democrats have also asserted that SEA 483 is unconstitutionally vague because: (A) it fails to define "indigency," (B) it fails to define "conform," and (C) it fails to provide standards for comparing a voter to the photograph on his identification card. None of these three contentions is convincing as proof that the statute is unconstitutional, for the reasons explained below.

A. *Failure to Define "Indigency."*

The Democrats argue that the indigent exception is vague because "indigency is nowhere defined in the Law. . . ." Democrats' Brief in Supp. at 39. That there is no legal definition is only partly true; actually, the Indiana Code contains several other provisions specifically referencing or targeting indigent individuals. *See, e.g.,* Ind. Code §§ 12-10-7 et seq. (Adult Guardianship Services); 16-21-9 et seq. (Provision of Charitable Care by Nonprofit Hospitals); 34-10 et seq. (Access to Courts by Indigent

Persons); 33-40-8 et seq. (Miscellaneous Legal Services for Indigents in Criminal Actions). Thus, SEA 483 is not plowing new ground by utilizing hitherto unknown terms of art. Moreover, the Democrats have omitted from their argument any evidence of individuals who might conceivably be confused by the indigent exception, let alone prosecuted for some improper reliance on this term or statute,[98] and, in any event, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado,* 530 U.S. 703, 733 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23 (1960)). Since Plaintiffs have not provided evidence of indigent individuals, or possibly indigent or confused indigent individuals, actually impacted by SEA 483, all we are left with are hypotheticals. Accordingly, we shall not set aside as unconstitutionally vague the indigency exception.

B. *Failure to Define "Conform."*

The Democrats, along with the League of Women Voters ("LWV") in its amicus brief, argue that SEA 483 is facially unconstitutional because it lacks standards for determining when the name listed on a photo identification "conforms" to an individual's voter registration record.[99] Their arguments hold that the failure to define or

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[98] We note that the threat of prosecution is exceedingly small since SEA 483 provides no mechanism for the circuit court clerk or the county election board to investigate or otherwise verify an individual's alleged indigence.

[99] *See* Ind. Code § 3-5-2-40.5 (providing, in relevant part: " 'Proof of identification' refers to a document that satisfies all the following: (1) The document shows the name of the individual to whom the document

(Continued on following page)

otherwise constrain the word "conform" is a grievous omission in the law which "gives a single precinct official the unfettered right to determine whether a particular form of identification (comports with) the law's requirements or whether the voter is the person depicted in that document" and thus "has the real potential for being used as a 'backdoor means of imposing impermissible content discrimination.'" Democrats' Brief in Supp. at 43 (quoting *National Coal. of Prayer, Inc. v. Carter,* 2005 WL 22536001, *13 (S.D. Ind. 2005) (Barker J)).

The LWV helpfully provided affidavits from actual registered voters who might be impacted by the "conforming" name requirement of SEA 483, citing as examples women whose names on their driver's licenses are hyphenated but should not be, and vice versa, as well as a woman whose last name should contain a space but whose license was printed without one ("de Martinez" is printed as "DEMARTINEZ"). *See* LWV Brief 11-13.[100] The LWV also advanced a working definition of "conform" based on *Webster's II New College Dictionary* which defines the term as: "to be similar in form or character" or "to . . . be in compliance." LWV Brief at 10.[101]

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was issued, and the name conforms to the name in the individual's voter registration record.")

[100] We acknowledge with thanks the care taken by the LWV to actually identify and provide affidavits from specific voters who could be impacted by SEA 483, which made the LWV's amicus brief one of the most useful filings in this action.

[101] Similarly, the *American Heritage Dictionary of the English Language* (4th Ed. 2000) defines "conform" as: "To correspond in form or character; be similar." The Democrats have not provided their own definition.

In all of the examples cited by the LWV, we note that the names listed on the photo identification are substantially similar to the names on the voter registration lists. The only potential anomalies Plaintiffs have identified are the trivial additions or subtractions of a hyphen or a space in a voter's last name. Neither the Democrats nor the LWV contends that "conform" means "identical," making us skeptical that the provided examples would run afoul of SEA 483's requirements. Therefore, this line of argument cannot succeed because it is based on "speculation about possible vagueness in hypothetical situations not before the Court [which] will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado,* 530 U.S. 703, 733 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23 (1960)).

Not giving even a tip of the hat to Article III standing principles, the Democrats contend that the problems created by the statute are not revealed so much in concrete examples of voters who might be impacted by SEA 483's provisions, but rather, by the lack of detailed guidance it provides as to how to define "conform," relying on their amorphous, generalized concern that counties and/or precincts might apply different standards in evaluating the legitimacy of voters' photo identification.[102] Continuing,

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[102] *See, e.g.,* Democrats's Reply Brief at 38 (stating "Under the Photo ID Law, the Legislature's failure to define the word 'conform' and the granting to precinct officials of unbridled discretion in making such determinations means that partisan individuals manning the over 900 precincts in Marion County and the thousands more throughout the State will be empowered to make individual decisions whether voters whose driver's license lacks the complete or accurate spelling of the voter's last name 'conforms' to the name of the voter list.")

the Democrats argue that the freedom to forgive obvious typographical errors as cited by the LWV "raises the legitimate fear that precinct officials will administer the Law differently from precinct to precinct or even voter to voter, thereby raising equal protection issues far more serious than those found unconstitutional in *Bush v. Gore,* [531 U.S. 98 (2000)]." The Democrats' reliance on *Bush v. Gore* is at best an unsteady footing for this contention.

We begin by noting that all precinct election officers are required to sign an oath of office with regard to the performance of their official duties, which includes the following affirmations: "I will faithfully and impartially discharge the duties of inspector (or judge, poll clerk, assistant poll clerk, or sheriff) of this precinct under the law" and "I will not knowingly permit any person to vote who is not qualified and will not knowingly refuse the vote of any qualified voter or cause any delay to any person offering to vote other than is necessary to procure satisfactory information of the qualification of that person as a voter." Ind. Code § 3-6-6-23. This oath applies to all precinct workers and requires them to act honestly and in good faith in administering the election code. Precinct workers who, as the Democrats fear, use SEA 483 as a "backdoor means of imposing impermissible content discrimination" thus would be acting in violation of their oath of office and contrary to establish Indiana law. Obviously, an oath of office is not an election code cure-all; however, it certainly suffices to assuage the vague, hypothetical concerns cited by Plaintiffs in their arguments to the Court.

The alternatives to photo identification proposed by the Democrats, such as signature comparison, utility bills, employment identification, or recognition by poll workers,

are each troubling substitutes. *See* Democrats' Brief in Supp. at 34; Democrats' Reply Brief at 32. The Democrats have not explained how the alternatives they propose are less subject to varying standards and/or selective enforcement then the conforming name requirement of SEA 483. Indeed, the Democrats' objections, when applied to the State's signature verification procedures as they existed prior to SEA 483, would create the same problem, namely, the absence of detailed instructions by which to compare a voter's signature to the name and signature on the voter registration list. In fact, the prior signature comparison procedures provided even less guidance and guarantee than does SEA 483; consider that, for in-person voters, the relevant statute provides: "In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration or any certified copy of the signature provided under IC 3-7-29. If the board determines the that the voter's signature is authentic, the voter may vote." Ind. Code § 3-11-8-25(c)(2) (superceded by SEA 483). The term "authentic" was not defined in the election code, nor did there appear to be guidance to a precinct worker in determining if a signature was "authentic." Similarly, the signature verification requirement for absentee voters, which was not changed by SEA 483, provides: "Upon receipt of an absentee ballot, a county election board (or the absentee voter board in the office of the circuit court clerk) shall immediately examine the signature of the absentee voter to determine its genuineness." Ind. Code § 3-11-10-4(a). "Genuineness" is not defined in the election code either. The Democrats have not addressed the constitutionality of these existing signature comparison provisions, beyond repeated arguments in their favor, and have advanced no plausible constitutional reason to distinguish

the signature comparison provisions from the "conforming" name provisions. We know of no convincing basis for making such a principled distinction.

The Democrats also fear "that precinct officials will administer the law differently from precinct to precinct or even voter to voter, thereby raising equal protection issues," which contention seems to directly contradict their professed reasons for including the Secretary of State and the Co-Directors of the Indiana Election Division as defendants in this action. In arguing against dismissing these defendants, the Democrats stated:

> Indeed, it is imperative that the State actors take an active role in the Law's implementation and administration, as a *laissez faire* approach to the enforcement of this Law or any other state election law could give rise to an equal protection claim, if for example the State's failure to take reasonable measures to ensure that the Photo ID Law is enforced uniformly and equally in all precincts of all 92 counties results in different citizens, due to the vagaries of their residence, being accorded different voting rights.

Democrats' Reply Brief at 14. Regarding SEA 483, either the Secretary of State (and staff) can ensure that uniform standards are applied across the state, or it cannot. If the Secretary of State has the power to administratively enforce standards "uniformly and equally in all precincts of all 92 counties," then the proper resolution of the Democrats' vagueness challenge is to allow the Secretary of State the opportunity to try to do so, rather than to invalidate the statute. If the Democrats maintain that the Secretary does not have this power to effect uniformity,

then including the Secretary as a defendant in this action was improper.

For those reasons, we reject the Democrats' claim that, because SEA 483 does not define "conform," it is unconstitutionally vague.

C. *Failure to Provide Photograph Comparison Standards.*

The Democrats, again in league with the LWV, challenge the standards, or lack there of, in SEA 483 for comparing voters to their identification photographs to verify identity. Although there is not a specific requirement that a person's appearance "conform" to the photograph on their identification card, SEA 483 does require that the photo identification "show[] a photograph of the individual to whom the document was issued." Ind. Code § 3-5-2-40.5(2). The LWV again has helpfully provided specific examples of women who have changed their appearances since obtaining their photo identifications. *See* LWV's Brief at 15-16. Similar to their arguments regarding the word "conform," the Democrats and the LWV contend that the photograph comparison provision of SEA 483 vests too much discretion in the hands of the local precinct officers.[103] This argument

[103] The LWV contends:

> Again, people, particularly women[,] often change their appearance. There are many women whose hair color and/or hair styles at the time they present themselves to vote will not match the color and/or style of their hair in their driver's license or state-issued identification card. Women and men change their eye color with contact lenses and also utilize the services of plastic surgeons.

LWV's Brief at 15.

fails for the same reasons we rejected the vagueness challenge to the word "conform." Neither the LWV nor the Democrats has provided plausible grounds for believing the photograph comparison standards in SEA 483 are any more vague or subject to abuse than the "time-honored means of confirming a voter's identity through signature comparison." Indeed, comparing a person to the photograph on their identification card is now a routine task in our society, one that occurs countless times as persons board airplanes, cash checks, rent movies, enter federal (and county) courthouses, or engage in any of the numerous other activities that require presentment of photo identification.

Moreover, we are not persuaded that the State is obligated to subsidize a voter who voluntarily changes her appearance so that she is no longer recognizable from her identification photograph. Indeed, a driver's license or identification card which cannot be used for identification purposes fails in its essential purpose which, as we have noted above, for the vast majority of Indiana residents, is a purpose unrelated to voting. Thus, in situations where an identification photograph can no longer be used for identification purposes, Indiana residents would need to replace the identification card for reasons unrelated to voting.[104]

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[104] Several of the concerns raised by the LWV are directly related to concerns that political challengers present at the polls could challenge a voter based on a perceived deficiency in their photo identification. As the LWV notes in its brief: "The determination of whether a challenge by a political challenger requires a voter to cast a provisional ballot has not yet been litigated." LWV Brief at 6. The political challenger statute is not at issue in this case. Accordingly, these concerns are not material to our determination and have not been addressed by the Court.

V. Democrats' Associational Rights Claim.

The Democrats appear to have abandoned their associational rights claim in their Reply Brief. Assuming that it has not been dropped, it is denied for the reasons elaborated above.

VI. 42 U.S.C. § 1971 Claims.

Plaintiffs next argument is that the photo identification requirements of SEA 483 violate 42 U.S.C. §§ 1971(a)(2)(A) & (B),[105] because they do not require all voters to present photo identification in order to vote, e.g. absentee voters. There is not support for this theory in § 1971, however, because well-settled law establishes hat § 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in

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[105] These provisions provide:

> (2) No person acting under color of law shall –
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> (A) in determining whether any individual is qualified under state law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by state officials to be qualified to vote;
>
> (B) deny the right to any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.
>
> 42 U.S.C. § 1971.

voting requirements.[106] In this case at bar, Plaintiffs have not alleged, much less proven, any discrimination based on race.

Apparently, despite their best efforts, Plaintiffs have been unable to uncover any evidence of racial discrimination flowing from the enforcement of SEA 483. At least we

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[106] *See, e.g., South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966) (holding: "*The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting,* which has infected the electoral process in parts of our country for nearly a century. . . . *Congress assumed the power to prescribe these remedies from [§]2 of the Fifteenth Amendment,* which authorizes the National Legislature to effectuate by 'appropriate' measures the constitutional prohibition against racial discrimination in voting."); *U.S. v. Mississippi,* 380 U.S. 128, 138 (1965) (holding: "The Fifteenth Amendment protects the right to vote regardless of race against any denial or abridgment by the United States or by any State. *Section 1971 was passed by Congress under the authority of the Fifteenth Amendment to enforce that Amendment's guarantee . . .* ") (emphasis added); *see also Kirksey v. City of Jackson, Mississippi,* 663 F.2d 659, 664-65 (5th Cir. 1981) (holding that "it is apparent that the language of [Section 2 of the Voting Rights Act] no more than elaborates upon that of the fifteenth amendment, and the sparse legislative history of [Section 2] makes clear that it was intended to have an effect no different from that of the fifteenth amendment itself.") (citing *City of Mobile v. Bolden,* 446 U.S. 55, 60-61 (1980); *United States v. Uvalde Consol. Ind. School Dist.,* 625 F.2d 547 (5th Cir. 1980)).

Against the great weight of these authorities, Plaintiffs unconvincingly cite several district court cases from the 1970s in support of the proposition that § 1971 can be applied outside the context of racial discrimination. *See, e.g., Ball v. Brown,* 450 F. Supp. 4, 7 (N.D. Ohio 1977); *Frazier v. Callicutt,* 383 F. Supp. 15, 20 (N.D. Miss. 1974) (noting, however, that "all discriminates here have been shown to be members of a minority community, and precisely the minority community which the Fifteenth Amendment and the Civil Rights Act of 1964 were primarily designed to protect"); *Sloane v. Smith,* 351 F. Supp. 1299, 1305 (D.C. Pa. 1972); *Brier v. Luger,* 351 F. Supp. 313, 316 (M.D. Pa. 1972); *Shivelhood v. Davis,* 336 F. Supp. 1111 (D. Vt. 1971). We do not regard these holdings as authoritative here.

have been presented with none. Thus, their reliance on § 1971 is unfounded.

Assuming *arguendo* that § 1971 does apply, it would not afford Plaintiffs the relief they seek. Plaintiffs' arguments regarding § 1971(a)(2)(A) suffer from fundamental contradictions which ultimately doom this claim. They strenuously assert that SEA 483 is invalid under § 1971(a)(2)(A) because it imposes different requirements on in-person and absentee voters;[107] as we have acknowledged previously, absentee voting is an *inherently* different procedure from voting in person, requiring a state which allows both in-person and absentee voting to apply different "standards, practices, or procedures" to these two groups of voters. Under Plaintiffs' argument, § 1971(a)(2)(A) requires abolishing all requirements which uniquely apply to only one set of voters,[108] an engine that loses its steam

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[107] *See, e.g.*, Democrats' Brief in Supp. at 19 ("It is clear from the face of the Photo ID Law that not all voters will be required to produce the required form of photo identification in order to vote and to have their vote counted. The Photo ID Law imposes its new identification requirements only (except for the [nursing home exception]) on those voters who appear in person to cast their ballot, but not on those who cast an absentee ballot by mail."); *Id.* at 20 ("This disparate treatment of in-person voters as compared to mail-in absentee voters on its face offends 42 U.S.C. § 1971(a)(2)(A) . . . "); ICLU's Reply Brief at 18 ("Nor is any similar restrictive identification requirement imposed on those who vote via absentee ballot. This violates the federal statute.")

[108] For example, under Indiana law, all voters voting in person are required to vote at the poll in the precinct where they reside, Ind. Code § 3-11-8-2, announce their "full and true name," Ind. Code § 3-11-8-19, and sign their name on the poll list, Ind. Code § 3-11-8-25(g). None of these procedures are required of absentee voters. On the other hand, to have their votes counted, absentee voters are required to sign an affidavit, Ind. Code § 3-11-10-16 referencing Ind. Code § 3-11-4-21, and properly seal their ballot, Ind. Code § 3-11-10-17(6). Neither of these requirements applies to in-person voters.

so long as Plaintiffs stop short of objecting to the practice of absentee voting or to any of the existing requirements applicable only to in-person or to absentee voters, which they have done. The only "difference" to which Plaintiffs seemingly object is the photo identification requirement, but in doing so they proceed without distinguishing this requirement from the plethora of other "standards, practices, and procedures" applicable to either absentee or in-person voters.[109] Plaintiffs' proposed construction of § 1971(a)(2)(A) would compel the invalidation of vast portions of the Indiana Election Code. We will not bring about such a radical departure from settled law by our decisions here.

Plaintiffs' arguments regarding § 1971(a)(2)(B) similarly overstate the reach of that portion of the statute which prohibits the denial of the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. § 1971(a)(2)(B). Plaintiffs

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[109] Plaintiffs' repeatedly note that SEA 483 imposes a "new" requirement, *see generally* Democrats' Brief in Supp. at 19-22; ICLU's Reply Brief at 18-20, perhaps to distinguish the photo identification requirement from the "time-honored" procedures Plaintiffs do not oppose (e.g. confirming a voter's identity through "affidavit and signature comparisons, as well as all other forms of identification such as utility bills, social security cards, credit cards, employment IDs," Democrats' Brief in Supp. at 34). However, there is nothing in the text of § 1971(a)(2)(A) which privileges older voting procedures over newer ones; indeed, advancing such an argument is obviously misplaced since one of the primary motivations for enacting the Voting Rights Act was to combat the "the blight of racial discrimination in voting, *which has infected the electoral process in parts of our country for nearly a century. . . .*" *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (emphasis added).

contend that SEA 483 violates this part of the statute because otherwise qualified, registered voters will be prevented from voting, or forced to use a provisional ballot, if they do not present a qualified photo identification. Defendants assert that § 1971(a)(2)(B) is not applicable to this case because SEA 483 merely changes the manner by which individuals prove their identity and does not require individuals to provide any additional information on any voting application or form.

We agree with Defendants' assertion that the act of presenting photo identification in order to prove one's identity is by definition not an "error or omission on any record or paper" and, therefore, § 1971(a)(2)(B) does not apply to this case.[110] Assuming § 1971(a)(2)(B) does apply, SEA 483 would still not run afoul of those statutory prohibitions. Plaintiffs' arguments are undermined by their concession that "some form of identification is material." ICLU's Reply Brief at 21. By conceding, as they must, that verifying an individual's identity is a material requirement of voting, Plaintiffs have necessarily also conceded that the state may establish procedures to verify this requirement. Plaintiffs' assertion that voters should be able to prove their identity through means other than photo identification is a weak equivocation over the Indiana General Assembly's selection of the allegedly wrong method for determining a material requirement to

[110] As the Eleventh Circuit explained: "This provision was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (citing *Condon v. Reno*, 913 F. Supp. 946, 949-50 (D. S.C. 1995)). SEA 483 does not implicate these concerns.

vote. This court's role is not to impose Plaintiffs' policy preferences (or its own, for that matter) in the absence of any statutory or constitutional deficiency. The decision of the General Assembly to require photo identification does not violate § 1971(a)(2)(B).[11]

The Plaintiffs next contend that SEA 483 violates § 1971(a)(2)(B) based on three potential "omissions" from an identification presented by a voter: the lack of a photo, the lack of an expiration date, or presentment of an identification not issued by the Indiana or the United States government. Each of these three statutory requirements is directly related to the material requirement of establishing an individual voter's identity. The photo allows poll workers to compare the individual's face to the identification tendered to ensure the individual is who

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[11] Plaintiffs attempt to distinguish SEA 483 by arguing that the requirement of providing photo identification cannot be material in-and-of-itself because not all voters must present photo identification; we regard this argument as unpersuasive for three reasons. First, the Indiana General Assembly has determined that, for the majority of voters, photo identification is highly material to proving their identity; we concur that photo identification is relevant to proving one's identity. This is not to say of course that there are not other methods of proving identification equally reliable and accurate, but the Indiana General Assembly is entitled to make its own judgment as to which method(s) it wishes to employ. The exceptions to the photo identification requirement do not undermine the value of photo identification in proving an individual's identity, nor do they diminish the importance of proving one's identity in order to vote. Second, as discussed above, the Indiana Code includes several other requirements applicable to a single class of voters to which Plaintiffs raise no objections and attempt no distinction. Adopting Plaintiffs' interpretation of § 1971(a)(2)(B) would necessitate a drastic rewrite of Indiana elections law, which Plaintiffs prudently do not advocate. Third, we find nothing in the language of § 1971 or the subsequent case law to indicate that a requirement must be applied to all voters equally in order to be deemed "material."

he/she professes to be; the expiration date is relevant to the reliability of the identification presented; and the governmental limitations on the sources of permissible identification also helps ensure that the identification card utilized by a voter is reliable. Because these three requirements directly relate to the process of verifying an individual's identity, they do not violate § 1971(a)(2)(B). Thus, we conclude that SEA 483 does not violate § 1971(a)(2)(B).[112]

VII. Indiana Constitutional Claims.

Finally, Plaintiffs argue that SEA 483 violates two provisions of the Indiana Constitution: Article II § 1, because the law's requirements are "grossly unreasonable," and Article II § 2, by imposing new, substantive requirements for voting (beyond age or residency). Neither of these assertions is persuasive for the reasons explained below.

A. *SEA 483 Is Not Grossly Unreasonable.*

Indiana Constitution Article II, Section 1 provides: "All elections shall be free and equal." The Indiana Supreme Court has interpreted these twin requirements as follows:

> It is said elections are free when the voters are subject to no intimidation or improper influence, and when every voter is allowed to cast his ballot as his own judgment and conscience dictate. That they are equal when the vote of every elector is

[112] Having determined that § 1971 is not applicable to this case, we decline to address whether Plaintiffs have a private right of action under the statute.

> equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot.

Blue v. State ex rel. Brown, 188 N.E. 583, 589 (1934) (overruled on other grounds). Article II § 1 notwithstanding, the Indiana General Assembly has wide latitude to adopt reasonable voting regulations. Indeed, "[i]t is for the Legislature to furnish a reasonable regulation under which the right to vote is to be exercised, and it is uniformly held that it may adopt registration laws if they merely regulate in a reasonable and uniform manner how the privilege of voting shall be exercised." *Id.*

Plaintiffs face a high hurdle in mounting their challenge to voting regulations under Article II § 1. Again, according to the Indiana Supreme Court:

> Being charged by the Constitution with the duty to "provide for the registration of all persons entitled to vote," and to enact such laws governing registration and the holding of elections that "all elections shall be free and equal," the Legislature has power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible.

Simmons v. Byrd, 136 N.E. 14, 17-18 (1922). In addition, SEA 483 comes to us for review cloaked in the presumption of validity, and "[t]he burden is upon those who challenge its validity to make any constitutional defect

clearly apparent." *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 76 (Ind. 1982).[113]

Plaintiffs' contention that SEA 483 is "grossly unreasonable" because it "will certainly impose an absolute barrier on voting for those persons who are unable to satisfy the BMV's requirements to obtain identification and it will impose onerous requirements on others" is without merit. ICLU's Reply Brief at 31. We would find this argument more persuasive if Plaintiffs had produced even a single affidavit from an individual attesting to his/her inability to vote as a result of SEA 483. To the contrary, Plaintiffs' own evidence indicates that the vast majority of registered voters already possess some form of photo identification that would comply with the requirements of SEA 483. These submissions reveal that compliance with SEA 483 is not "practically impossible" and, as a result, Plaintiffs' attempts to invalidate SEA 483 under the Indiana Constitution fall far short. Therefore, we hold that SEA 483 does not violate Indiana Constitution Article II § 1.

B. *SEA Does Not Impose A New, Substantive Voting Requirement.*

Plaintiffs next contend that SEA 483 is invalid under Article II § 2 of the Indiana Constitution, which sets the age of eighteen and the precinct residency term of 30 days

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[113] Plaintiffs urge us to adopt the standard articulated in *Dobbyn v. Rogers*, 225 Ind. 525, 544-45 (1948); however, that case involves the standard for invalidating a ballot based on a technical violation, when the vote was cast by a voter previously determined to be eligible to vote. This case does not address the standards for determining when and whether a voter is eligible to cast a ballot.

as requirements for voting. Plaintiffs contend that SEA 483 violates this provision by imposing additional substantive qualifications for voting which impermissibly create a "new public electorate." ICLU's Brief in Supp. at 54 (citing *Board of Election Com'rs of City of Indianapolis v. Knight,* 117 N.E. 565, 567 (1917)).

Plaintiffs argue that, although "[t]here is obviously implicit in Art[icle] 2, § 2 the notion that the person who is voting is in fact that person. . . . , the new Voter ID law goes far beyond mere identification. For, it demands a particular form of identification and, absent that, the vote is not counted." ICLU's Reply Brief at 32. Contrary to the requirements of SEA 483, Plaintiffs contend that the procedural requirements they prefer "merely satisf[y] the basic notion that the 'citizen of the United States, who is at least (18) years of age' is actually the person voting." *Id.* (citing Ind. Con. Art. 2, § 2). This argument is premised on a distinction without a difference, because any requirement that voters validate their identity necessarily implies that any voter unable to do so will not have his/her vote counted. The fact that Plaintiffs prefer alternative procedures to the photo identification does not create a Constitutional violation in requiring the latter. Nor is a Constitutional violation committed every time the General Assembly enacts a new voting regulation since, as we have previously noted, under Indiana law "the Legislature has power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted, so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Simmons v. Byrd,* 136 N.E. 14, 17-18 (1922). Accordingly, Plaintiffs have failed to demonstrate that SEA 483 violates Indiana Constitution Article 2, section 2.

VIII. Plaintiffs' Motions to Strike.

A. *Motion to Strike Defendants' Exhibits and Portions of Defendants' Briefs.*

Plaintiffs jointly filed a Motion to Strike, seeking to exclude forty-some exhibits submitted by Defendants which Plaintiffs claim are unsworn, unauthenticated, and contain hearsay.[114] The target of Plaintiffs' motion is various newspaper articles, transcribed oral statements, letters/press releases, committee reports, websites, polls, and journal articles which principally document reports of voter fraud in jurisdictions other than Indiana. Defendants maintain that the exhibits are admissible as "legislative facts" which tend to "to support reasonable conclusions that (1) voter fraud exists; (2) the public is concerned about it; and (3) requiring photo identification at the polls would address these problems." State's Resp. Brief in Opp. to Mot. to Strike at 6. Plaintiffs respond that there is no evidence in the legislative record of the materials submitted by the Defendants that was relied upon by the Indiana General Assembly.

Plaintiffs' argument against the Court's consideration of these exhibits as legislative facts is largely premised on their assertion that SEA 483 should be subject to strict scrutiny;[115] however, having determined that SEA 483 is

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[114] The initial motion sought to exclude forty-two of Defendants original seventy-three exhibits. Subsequent to the filing of this motion, Defendants submitted an additional six exhibits. Plaintiffs appear to object to at least one of the additional exhibits, to wit, Exhibit 76; however, since there is no separate discussion of the subsequently submitted exhibits, we are unclear whether Plaintiffs object to any other exhibits.

[115] *See, e.g.*, Pls.' Joint Reply at 3 ("The State Defendants' assumptions about the applicable evidentiary standards fail to take into

(Continued on following page)

not subject to strict scrutiny, this argument is unavailing. Thus, the state is entitled to rely on "legislative facts" to support its proffered justifications rather than being required to produce adjudicative facts to be evaluated by this court. Actually, there is no need for any "legislative facts" to have been cited by the General Assembly, based on Supreme Court precedent:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "legislative facts" explaining the distinction on the record has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 315 (1993). This clear and controlling holding dictates that Defendants' submissions are admissible to the extent that they tend to establish a reasonable justification for enacting SEA 483. However, to the extent that Defendants' challenged submissions are used to establish something other than a "legislative fact,"[116] they are not admissible

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account the fact that the Photo ID Law is subject to strict scrutiny because of the severe burden it imposes on the right to vote.")

[116] For example, Exhibit 76 is an unsworn and unauthenticated list of state licensed care facilities that served as polling facilities during the 2004 election.

and have not been considered by us in rendering our decision.[117]

Plaintiffs contend further that, because SEA 483 impacts First Amendment rights, we must undertake an independent review of Defendants' proffered factual basis.[118] To the extent that the court has an independent obligation to review the Defendants' exhibits, our judgment is that the materials provide a reasonable justification and factual basis for the Indiana General Assembly's decision to enact SEA 483.

Plaintiffs' Motion to Strike seems more likely premised on their attempt to deny the obvious – that voter fraud has been a topic of national concern and that photo identification requirements in many societal settings, including at the polls, are becoming ubiquitous – than in response to a procedural error. Concerning these facts, the Court could almost take judicial notice that the topics of voter fraud and voter suppression have been widely

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[117] The parties have not undertaken an individualized review of the exhibits and how they are utilized by the Defendants. Thus, without expending considerable time and effort meticulously combing the record, it is exceedingly difficult for this court to determine with precision which exhibits are used to establish legislative facts and which exhibits are used in an attempt to prove adjudicative facts.

[118] *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994) (explaining that a court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.") (citing *Century Communications Corp. v. F.C.C.*, 835 F.2d 292, 304 (D.C. Cir. 1987) ("[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures")).

discussed in the national media, especially in the wake of the 2000 and 2004 Presidential elections. In response to these concerns, an increased demand for photo identification has been widely imposed. Plaintiffs' attempt to exclude evidence of these patently obvious facts makes their motion to strike almost frivolous, but we will stop short of making that assessment.

B. *Motion to Strike Portions of Wendy Orange's Affidavit.*

Plaintiffs also filed a joint motion to strike portions of the Affidavit of Wendy Orange for failure to comply with Federal Rules of Evidence 701 and 702. This motion is *DENIED* as moot since the challenged opinions of Ms. Orange have played no role in our decisions.

Conclusion

For all the reasons explicated above, we declare that SEA 483 is a reasonable time, place, and manner election regulation. Accordingly, Defendants' Motions for Summary Judgment are *GRANTED* and Plaintiffs' Motions for Summary Judgment are *DENIED*.

IT IS SO ORDERED.

Date: 04/14/2006

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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484 F.3d 436

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

APRIL 5, 2007

Before

Hon. Frank H. Easterbrook, *Chief Judge*
Hon. Richard A. Posner, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*
Hon. Ann Claire Williams, *Circuit Judge*
Hon. Diane S. Sykes, *Circuit Judge*

Nos. 06-2218, 06-2317

WILLIAM CRAWFORD, *et al.*,

Plaintiffs-Appellants,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 1:05-cv-00634-SEB-VES – **Sarah Evans Barker**, *Judge.*

ORDER

On January 17, 2007, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing *en banc,* and on February 6, 2007, defendants-appellees filed an answer to the petition. A vote of the active members of the court on whether to grant rehearing en banc was requested and a majority of the judges have voted to deny the petition.* Judge Wood's opinion dissenting from the denial of rehearing *en banc* is appended.

The petition is therefore DENIED.

WOOD, *Circuit Judge*, with whom Judges ROVNER, EVANS, and WILLIAMS join, dissenting from the denial of rehearing *en banc*. The panel's opinion in this case addresses an exceptionally important unresolved question of law: what level of scrutiny should courts use when evaluating mandatory voter identification laws? I agree with the concerns expressed by Judge Evans, writing in dissent from the panel's opinion. Although the panel majority correctly notes that the Supreme Court's decision in *Burdick v. Takushi,* 504 U.S. 428 (1992), recognizes that strict scrutiny is not required for the assessment of every last election regulation, no matter how trivial the rule or how light the burden on voting, the panel assumes that *Burdick* also means that strict scrutiny is no longer appropriate in *any* election case. As Judge Evans makes clear, however, *Burdick* holds no such thing. To the contrary, *Burdick* simply established a threshold inquiry that a court must perform before it decides what level of scrutiny is required for the particular case before it. As I

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* Judge Rovner, Judge Wood, Judge Evans and Judge Williams voted to grant the petition for rehearing *en banc*.

explain briefly below, when there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny. Only this exacting approach will suffice to ensure that state law is not being used to deny these citizens their fundamental right to vote.

The *Burdick* Court held that "the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." 504 U.S. at 434. If those rights are subjected to "severe" restrictions, the Court reaffirmed that "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.*, quoting *Norman v. Reed,* 502 U.S. 279, 289 (1992). If, on the other hand, the state law provision "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." 504 U.S. at 434, quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983). To sort election laws into one category or the other, *Burdick* calls for the court to "weigh the character and magnitude of the asserted injury" that the plaintiff is asserting "against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." 504 U.S. at 434 (internal quotation marks and citations omitted).

In this case, the plaintiffs assert that the state voter identification law is causing the wholesale disenfranchisement of some eligible voters. To the extent that it

operates to turn them away from the polls, it is just as insidious as the poll taxes and literacy tests that were repudiated long ago. Anecdotal evidence suggests that the kind of close look that would take place if we used strict scrutiny would reveal troublesome patterns resulting from these new identification laws. The New York Times recently reported that overall voter turnout in these states decreases by about three percent, and by two to three times that much for minorities. Christopher Drew, *Low Voter Turnout is Seen in States That Require ID,* N.Y. TIMES, Feb. 21, 2007. In this case, the majority concedes that poorer voters are less likely to have the necessary identification than their wealthier counterparts and that there is a strong correlation between income and voting for particular political parties. My colleagues dismiss these facts by concluding that "[t]he fewer people harmed by a law, the less total harm there is to balance against [state interests]." Recent national election history tells us, to the contrary, that disenfranchising even a tiny percentage of voters can be enough to swing election outcomes. Christine Gregoire captured the gubernatorial race in Washington State in 2004 with a margin of only 129 votes. See http://en.wikipedia.org/wiki/Washington_gubernatorial_election,_2004 (visited March 22, 2007). Representative Vern Buchanan of Florida's 13th Congressional District won by only 329 votes. See http://en.wikipedia.org/wiki/Florida's%27s_13th_congressional_district (visited March 22, 2007). Senator Jon Tester of Montana won his seat by a slightly larger margin – 2,847 votes – but hardly a gap that implies that small numbers do not matter. See http://en.wikipedia.org/wiki/Jon_Tester (visited March 22, 2007). And surely no adult now living in the United States needs to be reminded of how close the 2000 Presidential race was.

Putting aside these examples, as a matter of law the Supreme Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters. Voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. Even if only a single citizen is deprived completely of her right to vote – perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification – this is still a "severe" injury for that particular individual. On the other hand, some laws that place a minor obstacle to voting in the way of many citizens – perhaps one that prevents any person from voting who is not registered to vote 28 days in advance of the election – are rightly seen as "reasonable [and] nondiscriminatory."

The state's justification for the new voting requirement is voter fraud – specifically, the problem of fraud on the part of people who show up in person at the polling place. Yet the record shows that the existence of this problem is a disputed question of fact. It is also a crucial question for the inquiry that *Burdick* demands, because if the burden on voting is great and the benefit for the asserted state interest is small as an empirical matter, the law cannot stand. This creates, as FED. R. CIV. P. 56 puts it, a "genuine issue of material fact" that may not be resolved in favor of the state in ruling on the state's own motion for summary judgment. In fact, it appears that no one has ever, in Indiana's history, been charged with voter fraud. *Burdick* requires an inquiry into the "precise interests put forward by the State as justifications for the burden imposed," but in this case, the "facts" asserted by the state in support of its voter fraud justification were

taken as true without any examination to see if they reflected reality.

Finally, this court should not ignore this country's history. Unfortunately, voting regulations have been used in the not-so-distant past for discriminatory reasons. The law challenged in this case will harm an identifiable and often-marginalized group of voters to some undetermined degree. This court should take significant care, including satisfactorily considering the motives behind such a law, before discounting such an injury.

It may be that even under the exacting scrutiny *Burdick* mandates for laws that impose severe restrictions, under which we must decide whether the regulation is narrowly drawn to advance a state interest of compelling importance, the Indiana law challenged here would stand. We are not yet in a position to conduct that inquiry. Before undertaking that task, the full court should decide what standard should govern review of such a law and what kind of empirical record must be assembled to support whatever standard it chooses. For all of these reasons, I respectfully dissent from the decision not to rehear this case *en banc*.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

IC 3-11-8-25.1 Admission of voter to polls

Sec. 25.1. (a) Except as provided in subsection (e), a voter who desires to vote an official ballot at an election shall provide proof of identification.

(b) Except as provided in subsection (e), before the voter proceeds to vote in the election, a member of the precinct election board shall ask the voter to provide proof of identification. The voter shall produce the proof of identification before being permitted to sign the poll list.

(c) If:

(1) the voter is unable or declines to present the proof of identification; or

(2) a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification under IC 3-5-2-40.5;

a member of the precinct election board shall challenge the voter as prescribed by this chapter.

(d) If the voter executes a challenged voter's affidavit under section 22.1 of this chapter, the voter may:

(1) sign the poll list; and

(2) receive a provisional ballot.

(e) A voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in an election.

(f) After a voter has passed the challengers or has been sworn in, the voter shall be instructed by a member of the precinct election board to proceed to the location where the

poll clerks are stationed. The voter shall announce the voter's name to the poll clerks or assistant poll clerks. A poll clerk, an assistant poll clerk, or a member of the precinct election board shall require the voter to write the following on the poll list:

(1) The voter's name.

(2) Except as provided in subsection (k), the voter's current residence address.

(g) The poll clerk, an assistant poll clerk, or a member of the precinct election board shall:

(1) ask the voter to provide or update the voter's voter identification number;

(2) tell the voter the number the voter may use as a voter identification number; and

(3) explain to the voter that the voter is not required to provide or update a voter identification number at the polls.

(h) The poll clerk, an assistant poll clerk, or a member of the precinct election board shall ask the voter to provide proof of identification.

(i) In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration or any certified copy of the signature provided under IC 3-7-29. If the board determines that the voter's signature is authentic, the voter may then vote. If either poll clerk doubts the voter's identity following comparison of the signatures, the poll clerk shall challenge the voter in the manner prescribed by section 21 of this chapter.

(j) If, in a precinct governed by subsection (g):

(1) the poll clerk does not execute a challenger's affidavit; or

(2) the voter executes a challenged voter's affidavit under section 22.1 of this chapter or executed the affidavit before signing the poll list;

the voter may then vote.

(k) Each line on a poll list sheet provided to take a voter's current address must include a box under the heading "Address Unchanged" so that a voter whose residence address shown on the poll list is the voter's current residence address may check the box instead of writing the voter's current residence address on the poll list.

IC 3-11-10-1.2 Proof of identification not required

Sec. 1.2. An absentee voter is not required to provide proof of identification when:

(1) mailing, delivering, or transmitting an absentee ballot under section 1 of this chapter; or

(2) voting before an absentee board under section 25 of this chapter.

IC 3-11.7-5-2.5 Challenge of voter; inability or declination to provide proof of identification

Sec. 2.5. (a) A voter who:

(1) was challenged under IC 3-10-1, IC 3-11-8, or IC 3-11-10-26 as a result of the voter's inability or declination to provide proof of identification; and

(2) cast a provisional ballot;

may personally appear before the circuit court clerk or the county election board not later than the deadline specified by section 1 of this chapter for the county election board to determine whether to count a provisional ballot.

(b) Except as provided in subsection (c) or (e), if the voter:

(1) provides proof of identification to the circuit court clerk or county election board; and

(2) executes an affidavit before the clerk or board, in the form prescribed by the commission, affirming under the penalties of perjury that the voter is the same individual who:

(A) personally appeared before the precinct election board; and

(B) cast the provisional ballot on election day;

the county election board shall find that the voter's provisional ballot is valid and direct that the provisional ballot be opened under section 4 of this chapter and processed in accordance with this chapter.

(c) If the voter executes an affidavit before the circuit court clerk or county election board, in the form prescribed

by the commission, affirming under the penalties of perjury that:

(1) the voter is the same individual who:

(A) personally appeared before the precinct election board; and

(B) cast the provisional ballot on election day; and

(2) the voter:

(A) is:

(i) indigent; and

(ii) unable to obtain proof of identification without the payment of a fee; or

(B) has a religious objection to being photographed;

the county election board shall determine whether the voter has been challenged for any reason other than the voter's inability or declination to present proof of identification to the precinct election board.

(d) If the county election board determines that the voter described in subsection (c) has been challenged solely for the inability or declination of the voter to provide proof of identification, the county election board shall:

(1) find that the voter's provisional ballot is valid; and

(2) direct that the provisional ballot be:

(A) opened under section 4 of this chapter; and

(B) processed in accordance with this chapter.

(e) If the county election board determines that a voter described in subsection (b) or (c) has been challenged for a

cause other than the voter's inability or declination to provide proof of identification, the board shall:

(1) note on the envelope containing the provisional ballot that the voter has complied with the proof of identification requirement; and

(2) proceed to determine the validity of the remaining challenges set forth in the challenge affidavit before ruling on the validity of the voter's provisional ballot.

(f) If a voter described by subsection (a) fails by the deadline for counting provisional ballots referenced in subsection (a) to:

(1) appear before the county election board; and

(2) execute an affidavit in the manner prescribed by subsection (b) or (c);

the county election board shall find that the voter's provisional ballot is invalid.

OPPOSITION BRIEF

Nos. 07-21 & 07-25

IN THE

Supreme Court of the United States

Nos. 07-21

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

Nos. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF STATE RESPONDENTS IN OPPOSITION TO THE PETITIONS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS

In No. 07-21, the Petitioners include State Representative William Crawford (D-Indianapolis) and Township Trustee Joseph Simpson (D-Indianapolis), along with several non-profit political-interest groups, including United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP. The Respondents are the Marion County Election Board ("MCEB") and intervenor the State of Indiana.

In No. 07-25, the Petitioners are the Indiana Democratic Party and the Marion County Democratic Central Committee ("MCDCC"). Respondents are Indiana Secretary of State Todd Rokita, Indiana Election Division Co-Directors J. Bradley King and Pamela Potesta, and the MCEB.

This consolidated brief in opposition to both petitions is submitted by the State Respondents, *i.e.*, Secretary of State Rokita, Election Division Co-Directors King and Potesta, and the State of Indiana.

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STATEMENT

In 2005, the Indiana General Assembly, wading into a swamp of inflated voter-registration lists and nationwide reports of in-person voter fraud, enacted a law requiring in-person voters to show poll workers government-issued photo identification, such as a driver's license or passport. In response, two arms of the Democratic Party, two elected officials aligned with that party, and several political-interest groups have mounted these constitutional challenges to the new Voter ID Law. The courts below both quite reasonably and correctly concluded that Indiana's Voter ID Law does not impose a burden on voters that is qualitatively more severe than other more common election regulations, such as voter registration or even in-person voting itself. Pet. App. 7, 111.[1] What is more, none of the plaintiffs provided any evidence suggesting the Law might have a disparate impact on any disadvantaged groups, including racial minorities.

Most telling of all, despite the hue and cry about the supposed burdens of this Law, and despite all of the politicians, political-party apparatus, and political-interest groups in the case, no plaintiff could identify a single actual voter who could not or would not vote because of the Voter ID Law. This fact succinctly demonstrates why this case is unworthy of the Court's attention: It proves the Law is benign, and it creates substantial vehicle problems, not least of which is to undermine all plaintiffs' Article III standing.

1. In 2000, the Indianapolis Star investigated the accuracy of Indiana's voter-registration rolls and found that more than 300 dead people remained registered to vote. C.A.7 State App. 36. Subsequently, that study was the subject of testimony before Congress concerning the need

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[1] The two Petitions are nearly identical except for facts about each group of Petitioners. Unless otherwise noted, citations to the petitions are to the *Crawford* Petition and its Appendix.

for election-fraud-prevention measures. C.A.7 State App. 122. In 2005, the Indiana Supreme Court decided not to use voter-registration lists to compile jury pools because, according to Justice Theodore Boehm, the State's voter-registration lists "are overpopulated (because the lists included many [people] who had died or moved)." C.A.7 State App. 127.

For this case, Clark Benson, a nationally recognized expert in the collection and analysis of voter-registration and population data, conducted an examination of Indiana's voter-registration lists and concluded that they are among the most highly inflated in the nation. Pet. App. 39-40. Specifically, when he compared actual voter registration with self-reported registration, he found that, in 2004, there were 4.3 million registered voters, while only 3 million voters reported being registered, resulting in estimated list inflation of 41.4%. Pet. App. 40; C.A.7 State App. 62.

Benson also looked at the registration rates before and after the National Voter Registration Act became effective on January 1, 1995. C.A.7 State App. 63. He found that, in 1988, the registration rate in Indiana was 69.71% of voting-age population, with voter turnout of 75.67% of voting-age population. But in 2004, the registration rate was 93.6% of voting-age population (12 counties reported more registered voters than voting-age population), with voter turnout of 58.5% of voting-age population, indicating high list inflation. C.A.7 State App. 63. When he reviewed the number of deceased voters on the list, Benson found, with a high rate of confidence, that at least 35,699 Indiana registered voters were deceased. Pet. App. 40; C.A.7 State App. 64. Additionally, Benson's research showed 233,519 potential duplicate registrations in 2004. Pet. App. 40; C.A.7 State App. 65.

2. As documented by the district court, voter fraud is a problem of disturbing prevalence around the country. Pet.

App. 40-41. For example, in Washington, a court found that more than 1,600 fraudulent ballots were cast in the 2004 gubernatorial election, including ballots cast by the deceased and those who had already voted, as well as dozens that could not be accounted for on voter-registration rolls. Pet. App. 41. In Missouri, an investigation by the Secretary of State found that, in the 2000 election, over 1,000 fraudulent ballots were cast in just two of the State's counties, including 68 double votes, 14 votes cast by dead voters, and 79 vacant-lot voters. Pet. App. 41. In Wisconsin, a joint federal/state task force found that in the November 2004 elections more than 100 fraudulent ballots were cast using fake names and addresses. *See Ind. Democratic Party v. Rokita*, No. 1:05-cv-00634-SEB-VSS, Docket No. 82 Ex. 4, at 3-6 (S.D. Ind. Dec. 1, 2005). In Miami, newspapers reported that dozens, possibly hundreds, of people who lived outside the city limits illegally cast votes in the 1997 mayoral elections. Pet. App. 41. The blue-ribbon National Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker, recently issued a report addressing the problem of voters who misidentify themselves at the polls, declaring that "there is no doubt that it occurs." Pet. App. 41; C.A.7 State App. 13.

3. It was against this backdrop of bloated voter rolls and nationwide reports of in-person voter fraud that the Indiana General Assembly enacted the Voter ID Law in 2005. The Law requires citizens voting in person on election day, or those casting a ballot in person at a county clerk's office prior to election day, to present election officials with valid photo identification issued by the United States or the State. *See* Ind. Code § 3-11-8-25.1. The Law applies to voting at both primary and general elections. *See* Ind. Code §§ 3-10-1-7.2; 3-11-8-25.1. It does not apply, however, to receiving or casting an absentee ballot by mail, or to "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code §§ 3-10-1-7.2(e); 3-11-8-25.1(f); 3-11-10-1.2. Senior

citizens (age 65 and older) and the disabled, among others, are automatically eligible to vote absentee and, therefore, do not need photo identification to vote. *See* Ind. Code § 3-11-10-24(a).

To be acceptable at the polls, government-issued photo identification must show the name of the individual to whom it was issued (which must conform to the name on the individual's voter-registration record) and an expiration date. *See* Ind. Code § 3-5-2-40.5. The expiration date must either not yet have occurred or have occurred after the date of the most recent general election. *See* Ind. Code § 3-5-2-40.5(3).

Voters are required to produce acceptable photo identification before signing the poll book. *See* Ind. Code § 3-11-8-25.1(b). If a voter does not provide proper identification, a member of the precinct election board "shall challenge the voter." Ind. Code § 3-11-8-25.1(c)(2). Upon being challenged, the voter may sign an affidavit attesting to the voter's right to vote in that precinct, and then sign the poll book and cast a provisional ballot. *See* Ind. Code § 3-11-8-25.1(d). A voter who casts a provisional ballot may appear before the circuit court clerk or county election board within ten days following the election to prove the voter's identity. *See* Ind. Code § 3-11.7-5-1. If at that time the voter provides acceptable photo identification and executes an affidavit swearing that the voter is the same individual who cast the provisional ballot, then the voter's provisional ballot will be opened, processed, and counted so long as there are no other non-identification challenges. *See* Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5. Alternatively, voters may validate their provisional ballots (again, within ten days of the election) by executing an affidavit attesting that the voter is the same person who cast the provisional ballot and either (1) is indigent and "unable to obtain proof of identification without payment of a fee" or (2) has a religious objection to being photographed. *See* Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).

If, notwithstanding a voter's attempt to validate his provisional ballot using one of these methods, the county election board determines that the provisional ballot is invalid, then the voter may file a petition for judicial review in the local circuit court. *See* Ind. Code § 3-6-5-34. Ultimately, therefore, the meaning of any particular term within the Voter ID Law is subject to the interpretation of the Indiana Supreme Court. *See* Ind. Code § 4-21.5-5-16 (petitions for judicial review are appealable "in accordance with the rules governing civil appeals from the courts"); *see also* Ind. R. App. P. 5(A) (giving the Court of Appeals jurisdiction over final judgments of circuit courts); Ind. R. App. P. 56, 57 (allowing discretionary transfer from the Court of Appeals to the Supreme Court).

While voters who drive must continue to pay for drivers' licenses, the Voter ID Law forbids the State to charge a person who is of voting age and who does not have a driver's license a fee for non-license photo identification. *See* Ind. Code § 9-24-16-10(b). Renewals and replacements of non-license photo identification also must be free of charge. *See* Ind. Code § 9-24-16-10(a). Voters can obtain non-license photo identification by presenting a document containing the person's name and current address and at least one "primary document," such as a birth certificate, passport, military or veteran's identification card, or Indiana driver's education permit. *See* 140 Ind. Admin. Code § 7-4-3.

4. In No. 07-21 (the *Crawford* case), the Petitioners originally filed suit in Marion Superior Court against Respondent MCEB, presenting several state and federal constitutional and statutory challenges to Indiana's Voter ID Law. C.A.7 State App. 196-211. Meanwhile, the Petitioners in No. 07-25 filed a separate complaint in the Southern District of Indiana against Secretary of State Rokita and the Election Division Co-Directors. *See Ind. Democratic Party*, *supra*, Docket No. 1 (May 2, 2005). After MCEB removed

Crawford to federal court, the district court consolidated the two cases. *See Crawford v. Marion County Election Bd.*, No. 1:05-cv-00804-SEB-VSS, Docket Nos. 1, 12 (S.D. Ind. June 13, 2005). Because the matter called into question the constitutionality of an Indiana statute, the State of Indiana intervened as a party defendant. Pet. App. 17-18. Later, the Democrats added MCEB as a defendant in its case. C.A.7 State App. 141-56.

The district court ultimately upheld the Voter ID Law on cross-motions for summary judgment. Pet. App. 16. But before reaching the merits, the court reviewed whether the case was even justiciable, both because no one had been identified who would not vote because of the law, Pet. App. 81, 85, 90, 94, and because the defendant state officials have "no direct role in enforcing election laws." Pet. App. 23, 59 n.30. Specifically, the defendant state officials do not decide whether particular individuals may cast ballots or whether particular provisional ballots will be counted.[2] Nonetheless, the district court permitted the case to proceed on the theory that the plaintiffs could assert the rights of hypothetical voters not before the court who might not realize until they get to the polls that they do not have proper identification. Pet. App. 77-79, 85. And since the plaintiffs had managed to name at least one legitimate defendant—the MCEB—the court decided not to bother dismissing the case against the state officials. Pet. App. 59 n.30.

On the merits, the district court ruled that strict scrutiny does not apply to the Voter ID Law because there is no

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[2] It is the duty of the county election board—not state officials—"to determine whether to count a provisional ballot." Ind. Code § 3-11.7-5-2.5. The State Respondents cannot review a county election board's decision not to count a provisional ballot. *See id.* If an individual voter wishes to seek judicial review of a determination that a provisional ballot should not be counted, then the voter must sue the county board. *See* Ind. Code § 3-6-5-34.

evidence that any individuals or groups would "be forced to undertake appreciable burdens in order to vote." Pet. App. 101. Groups identified by the plaintiffs as particularly vulnerable to the Law's burdens, such as the elderly and the poor, do not need any identification to vote, the court observed, because they either are eligible to vote absentee or are exempted as indigent. Pet. App. 101-02 & n.70. Furthermore, although plaintiffs "concentrated their evidence and arguments on the burdens of obtaining a driver's license or identification card from the BMV," this evidence was "ultimately irrelevant" because there was no showing that any individuals or groups—including racial or socioeconomic groups—would find these burdens too onerous to surmount. Pet. App. 101. Thus, the court found the State's "important regulatory interest" in combating voter fraud sufficient to justify the Voter ID Law's "reasonable, nondiscriminatory restrictions." Pet. App. 108.

5. On appeal, in an opinion written by Judge Posner, the Seventh Circuit acknowledged that "[t]here . . . are no plaintiffs whom the law will deter from voting," yet held that the Democratic Party had standing on the theory that the Voter ID Law injures it "by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." Pet. App. 4, 5. And though the Indiana Democratic Party conceded that it does not have "members" as such, Pet. App. 47-48, and never demonstrated that anyone would be prevented from voting, Pet. App. 78, the court ruled that "[t]he Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting by the new law." Pet. App. 4. Finally, the court stated that "[t]he standing of the many other plaintiffs in these consolidated suits—candidates, voters, organizations—is *less certain*, but need not be addressed." Pet. App. 4 (emphasis added).

On the merits, the court rejected the Petitioners' argument that any burden on the right to vote, however slight, must be subjected to strict scrutiny. Pet. App. 5-6. In fact, the court judged that "[a] strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger." Pet. App. 6 (citing *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5, 7 (2006) (per curiam)). The court observed that "[t]he Indiana law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest in defraying the cost of elections or in limiting the franchise to people who really care about voting or in excluding poor people or in discouraging people who are black." Pet. App. 6. Rather, "[t]he purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote." Pet. App. 6. Even the dissenting judge recognized that strict scrutiny did not apply, Pet. App. 11 (Evans, J., dissenting), as did other judges who voted to rehear the case en banc. Pet. App. 154-55 (Wood, J., dissenting from denial of petition for rehearing en banc).

The court also ruled that the Voter ID Law easily survives the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The record shows at most a "slight" burden on voting because "few[]" voters "will actually disfranchise themselves rather than go to the bother" of obtaining photo identification. Pet. App. 5, 7. Yet, "[i]ndirect evidence of [voter] fraud, or at least of an acute danger of such fraud, in Indiana is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote." Pet. App. 8-9. The balance favors the State all the more because "the details for regulating elections must be left to the states, pursuant to Article I, section 4, of the Constitution," which in turn means "'that States may, and inevitably must, enact reasonable regulations of parties,

elections, and ballots to reduce election- and campaign-related disorder.'" Pet. App. 10.

REASONS FOR DENYING THE PETITIONS

Unless there is something inherently cert-worthy about *all* lower court decisions that uphold new voting regulations, there is nothing about this case that justifies this Court's review. No appellate court—state or federal—has ruled that voter-identification laws of any sort violate the United States Constitution. And, consistent with the wide latitude that the Elections Clause affords States over election mechanics, the Seventh Circuit applied the same balancing test to the Indiana Voter ID Law that circuits always apply to reasonable, non-discriminatory voting regulations, including voter-identification laws.

Petitioners' principal argument is that the Voter ID Law should be subjected to strict scrutiny because it imposes a "severe burden" on the right to vote. Pet. 19. But nowhere do they explain how that is so. They do not show, for example, that the Voter ID Law is somehow qualitatively more burdensome on voters than 30-day advance-registration or in-person-voting requirements. And their effort to prove that the Voter ID Law imposes a particularly difficult burden on the poor and elderly—two voting groups essentially exempt from the Law—failed when the district court ruled their proof inadmissible as "utterly incredible and unreliable." Pet. App. 60.

What is more, even if the constitutionality of voter-identification laws were to be of interest generally to the Court, this case suffers from substantial vehicle problems. First, the Article III standing of each of the plaintiffs in both cases is questionable at best—the two lower courts could not even agree on who had standing or why. Second, granting review of the issue now would likely prompt a raft of last-minute voter-identification challenges that would disrupt the

2008 presidential primaries. Third, in this case there is no record of the actual impact that voter-identification laws have on voting rates—a record that might inform a judgment about the level of burden imposed. Accordingly, even if the issue were otherwise cert-worthy, the Court would be wise to await a later case where it can be sure of getting to the merits, where it will not disrupt multiple elections, and where it will have a more comprehensive record to review.

I. Lower Courts Uniformly Apply The Constitutional Balancing Standard For Non-Discriminatory Election-Administration Laws And No Conflict Over Voter-Identification Laws Has Yet Emerged

Petitioners claim a "need to articulate the standard of review to be applied to voter identification laws." Pet. 22. Truth be told, there is no uncertainty whatever in this area of the law. Indeed, Petitioners do not even attempt to assert a lower court conflict as to either the validity of voter-identification laws or the standard to be used in assessing the validity of such laws. Their sole point of disagreement with the decision below is their largely fact-based contention that the Indiana Voter ID Law imposes a "severe burden" on the right to vote. Pet. 19. That contention, however, raises no substantial issue of law meriting review.

1. To begin, with respect to challenges of laws regulating election mechanics, such as voter-registration requirements, election-day procedures, and other election laws, federal circuits regularly apply the balancing test from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992) (explained in more detail in Part II.A., *infra*)—a test much more deferential than strict scrutiny. Perhaps equally significant, this Court denies review of such cases with equal regularity. *See Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) (applying *Burdick* to an equal-protection challenge to touchscreen balloting), *cert. denied*, 127 S. Ct. 934 (2007); *Griffin v.*

Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (applying *Anderson/Burdick* balancing to limitations on absentee balloting), *cert. denied*, 544 U.S. 923 (2005); *Coal. for Free & Open Elections v. McElderry*, 48 F.3d 493, 497 (10th Cir. 1995) (applying *Anderson/Burdick* balancing to Oklahoma's ban on write-in voting), *cert. denied*, 516 U.S. 813 (1995); *cf. Wit v. Berman*, 306 F.3d 1256, 1259 (2d Cir. 2002) (applying *Burdick* to a law prohibiting dual-residence citizens from voting in multiple local elections), *cert. denied*, 538 U.S. 923 (2003); *see also Gonzalez v. Arizona*, 485 F.3d 1041, 1049-50 (9th Cir. 2007) (applying *Burdick* to rule requiring first-time voters to present proof of citizenship at registration; no petition filed); *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir. 1996) (applying *Burdick* to requirement that certain poll workers be appointed by two largest political parties; no petition filed).

Moreover, all federal courts to consider *voter-identification laws* have applied *Anderson/Burdick* balancing. *See Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006) (applying *Burdick* to Georgia's photo-identification law); *see also ACLU of N.M. v. Santillanes*, 2007 WL 782167, at *25 (D. N.M. 2007) (applying *Burdick* to City of Albuquerque's photo-identification law), *appeal pending*, No. 07-2067 (10th Cir.); *Gonzalez v. Arizona*, 2006 WL 3[illegible]297, at *7 (D. Ariz. Sept. 11, 2006) (applying *Burdick* to in-person-voting identification requirement), *aff'd*, 485 F.3d 1041 (9th Cir. 2007); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 435 (E.D. Mich. 2004) (applying *Burdick* to federal first-time voter-identification requirements); *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) (same).

All state courts considering federal constitutional challenges to voter-identification laws have likewise applied *Anderson/Burdick* balancing. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, No.

130589, Slip Op. at 18 (Mich. July 18, 2007) (applying *Burdick* to requirement that in-person voters present photo identification or sign an affidavit stating that the voter does not have such identification); *Colo. Common Cause v. Davidson*, 2004 WL 2360485, at *3 (Denver Dist. Ct. Oct. 18, 2004) (applying *Burdick* to in-person-voting identification requirement).

2. Nor is there any conflict as to the ultimate constitutionality of voter-identification laws that needs to be resolved. So far, the Seventh Circuit is the only federal circuit to rule on the merits of a voter-identification-law challenge. The only state court of last resort to consider the matter has *upheld* a state voter-identification law under the United States Constitution. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, Slip Op. at 26. And the only state appellate court to *invalidate* a voter-identification law did so exclusively on *state*-law grounds. *See Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo. 2006) (holding that Missouri's photo-identification requirement violated the state constitution, but expressly distinguishing the federal constitution and disclaiming any reliance on it).

To be sure, there are federal district courts that either have declared voter-identification laws invalid under the United States Constitution or are still considering such challenges. *See Santillanes*, 2007 WL 782167, at *2 (granting declaratory judgment invalidating photo-identification requirement enacted by local ordinance), *appeal pending*, No. 07-2067 (10th Cir.); *Common Cause/Ga.*, 439 F. Supp. 2d at 1345 (granting preliminary injunction against photo-identification law; permanent-injunction case remains pending). These cases will likely result in merits decisions by the Tenth and Eleventh Circuits, respectively. The best course is to reject this case, allow these federal circuits a chance to rule on the merits, and then assess whether the circuits are in conflict.

Petitioners impatiently argue that this case presents "a fundamentally important constitutional question that should *now* be resolved by this Court," even before a circuit conflict arises. Pet. 22 (emphasis added). But as the string of certiorari denials cited in Part I.1, *supra*, demonstrates, the Court has generally not waded into election-law disputes without at least *some* conflict that demands resolution. In fact, since *Anderson* set the balancing test for reasonable, non-discriminatory election regulations in 1983, aside from *Bush v. Gore*, 531 U.S. 98 (2000) (obviously *sui generis*), *Norman v. Reed*, 502 U.S. 279, 287 (1992) (where both sides filed petitions), and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (principally a party-association case), the Court has reviewed constitutional voting-rights challenges to state electoral-mechanics and ballot-access laws *only* where there was either a lower-court conflict or at least a preliminary invalidation of state law, as follows:

Lower-court conflict: *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 355-56 (1997) (resolving conflict between Seventh and Eighth Circuits over constitutionality of banning fusion candidacies); *Burdick*, 504 U.S. at 432 (resolving conflict between Fourth and Ninth Circuits over constitutionality of prohibiting write-in voting); *Anderson*, 460 U.S. at 786 (resolving conflict among First, Fourth, and Sixth Circuits over constitutionality of early-filing deadlines for independent presidential candidates).

Preliminary or final invalidation of election law: *Lopez Torres v. N.Y. Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (Feb. 20, 2007) (reviewing decision preliminarily enjoining New York's system for nominating state trial judges); *Wash. State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 1373 (Feb. 26, 2007) (reviewing decision invalidating Washington's top-two primary system); *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5, 6 (2006) (per curiam)

(reviewing decision preliminarily enjoining Arizona's voter-identification law); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (reviewing decision invalidating Oklahoma's semi-closed-primary law); *Cook v. Gralike*, 531 U.S. 510, 517-18 (2001) (reviewing decision invalidating discriminatory ballot-notation law); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 785-87 (1995) (reviewing decision invalidating Arkansas's ballot-access scheme for imposing term limits); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 211 (1986) (reviewing decision invalidating Connecticut's closed-primary law); *Munro v. Socialist Workers Party*, 479 U.S. 189, 191 (1986) (reviewing decision invalidating Washington's ballot-access law).

None of these usual justifications for review exists here. The Court should follow its ordinary course and let the issues presented percolate awhile. It can intervene in a later case if an actual conflict ever emerges.

II. The Decision Below Is Consistent With The Court's Holdings Concerning Reasonable Non-Discriminatory Election Regulations

Petitioners assert that the decision below "conflicts with decisions of this Court regarding the appropriate legal standard to be applied to cases involving severe burdens on the right to vote." Pet. 14. They fail, however, to explain how the Indiana Voter ID Law either imposes a "severe" burden on voters (a particularly glaring omission with a record that identifies no one unable to vote because of the Law) or differs in any other meaningful way from election-mechanics laws the Court has evaluated using *Anderson/Burdick* balancing. Again, there is no doctrinal uncertainty justifying review.

A. Well-established doctrine allows States great leeway to manage elections

The Court applies strict scrutiny to three categories of election laws: (1) those that impose *substantive* qualifications for voting, such as a one-year residency requirement, *Dunn v. Blumstein*, 405 U.S. 330, 332 (1972), or a property-ownership requirement, *Hill v. Stone*, 421 U.S. 289, 291 (1975); (2) those that infringe on separately enunciated constitutional rights, such as the right against poll taxes, *Harman v. Forssenius*, 380 U.S. 528, 529 (1965), *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966), and the right to travel, *Dunn*, 405 U.S. at 338; and (3) those that dilute legitimate votes. *See Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

However, the Court does *not* apply strict scrutiny to non-discriminatory regulations of the voting *process*. A principal reason is that, as the decision below observed, the Elections Clause grants the States the power to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congressional oversight. *See* U.S. Const. art. I, § 4, cl. 1; *see also* Pet. App. 10. The Elections Clause also presupposes and reinforces the States' inherent power to regulate their own elections. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Particularly in light of the Elections Clause, the Court has consistently afforded States substantial leeway in regulating the mechanics of elections.

As noted, the Court set forth the balancing test courts should apply when reviewing a State's exercise of its Elections Clause authority in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," *i.e.* whether plaintiffs have alleged a significant burden on the right to vote. *See id.*

Courts must then identify and evaluate the state interests supporting the challenged law, including the "strength of each of those interests" and the extent to which they "make it necessary to burden the plaintiff's rights." *Id.* "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

The Court explained this standard further in *Burdick v. Takushi*, 504 U.S. 428, 432 (1992), where it rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Rather, a "flexible" standard applies. *See id.* at 434. When voting rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, non-discriminatory restrictions' . . . 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (internal citations and quotations omitted).

In addition, *Burdick* made it clear that this flexible balancing test applies to laws affecting voting mechanics as well as those regulating ballots because the Court's precedents have "minimized the extent to which voting rights cases are distinguishable from ballot access cases." *Id.* at 438; *see also Tashjian*, 479 U.S. at 214 (applying balancing test to law restricting primary-election voting to registered party members); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (applying balancing test to law limiting the range of candidates that minor party could nominate).

Recently, in *Clingman v. Beaver*, 544 U.S. 581, 584 (2005), the Court confirmed the vitality of the *Anderson/Burdick* balancing standard when it upheld an Oklahoma law requiring voters to register as independents or with a party before voting in that party's primary. The

registration requirement involved a minimal burden at most—"[m]any electoral regulations, including voter registration generally, require that voters take some action to participate"—so strict scrutiny did not apply. *See id.* at 592-93. "[O]rdinary and widespread burdens," the Court reasoned, should not be deemed severe because that would "hamper the ability of the States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Id.* at 593. Such state election regulations are valid if reasonably related to the State's "important regulatory interests." *Id.* at 587.

This is an easier case than any of the foregoing because here, as the Seventh Circuit observed, "the right to vote is on both sides of the ledger." Pet. App. 6. That is, every improper vote cancels out a legitimate vote, both disenfranchising eligible voters and generally diluting the voting strength of the legitimate electorate. Pet. App. 6. Anti-fraud measures such as the Indiana Voter ID Law thus directly preserve the right to vote at full strength. *See Purcell v. Gonzalez*, __U.S.__, 127 S. Ct. 5, 7 (2006) (per curiam) (recognizing that voter-identification laws "prevent[] voter fraud" and consequent "'debasement or dilution of the weight of a citizen's vote'"). This renders strict scrutiny even less appropriate than it was in *Anderson*, *Burdick*, and *Clingman*.

Yet Petitioners implausibly suggest that *Purcell*, 127 S. Ct. at 7, which summarily reversed a Ninth Circuit injunction against Arizona's voter-identification law, somehow questioned the review applicable to voter-identification laws generally. Pet. 20-22. If anything, the Court in *Purcell* instructed lower courts to do exactly what the Seventh Circuit did here—to balance any negative effects on the right to vote against the States' compelling interest in preventing voter fraud. *See Purcell*, 127 S. Ct. at 7 ("Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental

political right' to vote."). *Purcell* restated and applied *Anderson/Burdick* balancing in a nutshell; it left no room for the inference that voter-identification laws are constitutionally distinct from other regulations of electoral mechanics.

B. The Indiana Voter ID Law is a non-discriminatory regulation of election procedures subject to *Anderson/Burdick* balancing

A requirement that voters present poll workers with commonly available photo identification is a reasonable means of regulating elections and preventing in-person voter fraud. It is no more a substantive or burdensome voting qualification than the prohibition on write-in voting that *Burdick* upheld as a "very limited" restriction. *See Burdick*, 504 U.S. at 437. Thus, not only is there no conflict over whether to apply *Anderson/Burdick* balancing to voter-identification laws, the lower courts are right to do so.

1. In criticizing the Seventh Circuit's ruling that the Voter ID Law does *not* impose a severe burden on the right to vote, Petitioners mischaracterize the court's reasoning. According to Petitioners, the court below said that States can prohibit certain persons from voting "until, and unless, an unspecified minimal number of voters are precluded from voting." Pet. 23. But the Seventh Circuit never suggested that a prohibition or a ban on voting is somehow acceptable if it applies only to a few voters. It said only that in assessing the severity of a burden imposed by a law that does not facially preclude anyone from voting (or even establish eligibility criteria), one factor is whether many people find it sufficiently inconvenient that it deters them from voting. Pet. App. 5-6. Thus, the court assessed the electoral "burden" by analyzing how "slight it is" *and* "the number of voters affected by it," which of course are overlapping, interrelated inquiries. Pet. App. 5.

This straightforward standard, properly described, is not remotely controversial, and even Petitioners, all of whom contend that the Voter ID Law disenfranchises many voters, do not disagree with it. Pet. 19. The Democrats even attempted to prove this burden, but lost that evidentiary issue with proof that was "utterly incredible and unreliable." Pet. App. 60 (also observing that "to the extent that [the report's] socioeconomic analysis is accurate, [it] revealed no disparate impact . . . based on a voter's race or education level" and only an insignificant impact based on income).

Even now Petitioners cannot point to a better way of measuring a burden's severity and do not otherwise attempt to explain *how* the Voter ID Law imposes a "severe" burden on the right to vote. To be sure, Petitioners repeatedly declare or presuppose this to be the case. Pet. 3, 14, 19, 24. But they have put forth no theory whatever as to why requiring voters to present government-issued photo identification—which their own data show to be possessed by 99% of the voting-age population, Pet. App. 69—is qualitatively or inherently a "severe" burden, while 30-day advance-registration laws and in-person-voting requirements are *not*.

Indeed, Petitioners expressly agreed below that some voter-identification laws, such as the requirements the Help America Vote Act ("HAVA") imposes on first-time voters who register by mail, are perfectly acceptable. Dem. C.A.7 Br. 46; Crawford C.A.7 Br. 45-46. Even the Petitions treat HAVA as a constitutional yardstick, a tool for flagging more restrictive voter-identification laws as constitutionally suspect. Pet. 15-19. No doubt Petitioners will explain this distinction by referring to the supposedly greater difficulties of obtaining a driver's license as compared with, say, a utility bill. *Cf.* Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1712 (codified at 42 U.S.C. § 15483(b)(2)(A)) (permitting first-time voters to prove identification with utility bills, bank statements, paychecks,

and government checks). But what constitutional principle allows voter identification by utility bills and bank statements but not drivers' licenses and passports?

2. Petitioners provide no plausible alternative to *Anderson/Burdick* balancing as a neutral rule for evaluating the Voter ID Law. Their proposed substitute, that an election regulation must be subjected to strict scrutiny if it causes even *one* qualified person to be unable to vote, cannot be correct. Pet. 25. Such a rule would require strict scrutiny of ordinary election laws, such as advance-voter-registration and in-person-voting requirements, that routinely deter or prevent untold numbers of legitimate, eligible voters from casting ballots. Subjecting every such election regulation to strict scrutiny would (a) constitutionalize a right to vote in the least restrictive manner and (b) put federal courts in the business of writing state election codes—in square conflict with the Elections Clause. Therefore, incidental deterrence of qualified voters, while unfortunate, cannot without more signal a "severe" burden on the right to vote.

The cases Petitioners rely on do not suggest otherwise—indeed, they fully support the analysis below. Petitioners cite *Anderson*, 460 U.S. at 792, for the proposition that a "serious and unreasonable burden may involve something short of absolute disfranchisement" because, in that case, the statute was "unconstitutional because it placed 'a particular burden' on Ohio's independent voters, not because it placed an impossible burden." Pet. 25 n.15. Similarly, they suggest that the decision below is inconsistent with *Smith v. Allwright*, 321 U.S. 649, 651 (1944), which held that excluding a single voter from a primary election on racial grounds violated the Fifteenth Amendment. Pet. 25-26. But in both cases, it was discrimination—in *Anderson* against independents and in *Smith* against a black voter—that made the burdens unconstitutional. In contrast, there is no plausible narrative of electoral discrimination here, and

Petitioners offer no alternative principle that would render the Voter ID Law constitutionally suspect.

3. As for the actual application of *Anderson/Burdick* balancing, there can be little doubt that, as with other routine election regulations, any incidental, marginal deterrence of legitimate voters is more than outweighed by the protection the Voter ID Law affords to legitimate voters as a whole. *See Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (holding that the public interest in "permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote" outweighs the interest in permitting "every registered voter to vote freely"). This conclusion is particularly indubitable in light of Petitioners' failure to prove that any voters—individuals *or* groups—would suffer disenfranchisement as a result of the Voter ID Law. Pet. App. 5, 101.

The Petitions do not even bother to contest the notion that the balancing test yields a victory for the Voter ID Law. Petitioners do argue that "'a State may not dilute a person's vote to give weight to other interests,'" Pet. 25, but they ignore that the Voter ID Law exists *precisely* to prevent legitimate votes from being diluted by fraudulent ones.

III. These Cases Are Poor Vehicles For Reviewing Voter-Identification Laws

As the district court observed, these cases from the start have represented nothing more than politics by other means. Pet. App. 18 ("This litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts."); *cf.* Pet. App. 11 (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

That motivation may well be present in many facial constitutional challenges that the Court hears, but usually there is at least one plaintiff who directly suffers from being regulated by the challenged law. Here, it bears repeating, none of the Petitioners could identify a single registered voter who would not or could not vote because of the Voter ID Law. Pet. App. 5, 101. As a result, Petitioners' standing to bring this case collapses in a heap. Furthermore, if voter-identification laws are proliferating nationally, the Court should have far better opportunities for reviewing such laws after the 2008 elections when granting review will not precipitate emergency, election-eve challenges, and when an actual record of enforcement experience can inform the Court's decision.

A. Standing remains a core uncertainty in both cases

The absence of any injured voters in these cases has made the search for Article III standing something of a parlor trick. The Democratic Parties and the political-interest groups, of course, are not directly regulated by the Law and have no voting rights of their own to assert. Pet. App. 46-49, 53-58. And while Crawford and Simpson could conceivably assert their own rights, they are not injured because they already have the required photo identification. Pet. App. 52-53. Both claim offense at having to show identification at the polls, but this is not cognizable Article III injury. Pet. App. 76 & n.48.

Nonetheless, the district court and the Seventh Circuit both found at least one party with Article III and prudential standing—though it is telling that those courts did not even remotely agree on the reasons. Substantial standing questions would remain even if the Court were to take the case.

1. The district court divined a theory of associational standing whereby the political-party plaintiffs and political-

candidate plaintiffs could assert the rights of hypothetical voters who *have* proper photo identification, but who might *forget* to take it to the polls. Pet. App. 78-79, 85.[3] The district court arrived at this theory only after rejecting every last one of the Petitioners' own arguments as to why they could represent the rights of individuals who actually lack proper identification. Pet. App. 73-96. The Democrats identified party supporters who supposedly did not have proper identification, but each of them either was entitled to vote absentee (where no identification is required) or already possessed proper identification.[4] Pet. App. 80-82. And the district court flatly rejected the notion that the Democrats could represent the interests of any voters who, without more, merely happen to want to vote for Democrat candidates. Pet. App. 77-79. The political-interest-group plaintiffs fared no better with their theory that they could assert the rights of hypothetical individuals the groups unilaterally presumed to protect. Pet. App. 92-95.

In light of these conclusions, the district court's alternative theory that the Democrats and candidates Crawford and Simpson have standing to represent "voters

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[3] The Democrats initially raised a claim that the Voter ID Law, as applied to primary elections, infringed their right of free association. The district court, however, ruled that the Democrats had abandoned that claim, Pet. App. 135, and the Democrats neither revived it on appeal nor presented it in their Petition. Respondents had always argued that, while the free-association claim itself was meritless, the Democratic Party at least had standing to raise it.

[4] The district court concluded that the Democratic Party could assert the *equal-protection* rights of these individuals insofar as it claimed that the Voter ID Law discriminates in favor of absentee voters and residents of nursing home polling places. Pet. App. 83. The Democratic Party did not plainly articulate a separate equal-protection claim on appeal, however, and they have not presented it as an issue in their Petition.

who have secured or could secure the necessary photo identification but, for some reason, will be unable to present such identification at the polls at the time of voting" is perplexing. Pet. App. 78-79. If anything, it makes less sense to hypothesize such happenstance injuries—and to empower political parties and candidates to raise them without consent of the voters—than it does to assume that some unspecified voters will be unable to obtain proper identification before an unspecified election.

The district court relied on *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004), which held that a political party could assert the rights of voters who "cannot know in advance that [their] names will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to human error by an election worker who mistakenly believes the voter is at the wrong polling place." But in that case, the plaintiffs challenged an interpretation of HAVA that would have allowed poll workers to deny provisional ballots based on an on-the-spot assessment of a voter's residency, which, in turn, would have rendered invalid provisional ballots cast in the wrong precinct by eligible voters. *See id.*

Here, in contrast, no voter who has proper identification but fails to produce it at a polling station is thereby denied the right to vote. The voter can retrieve the identification and return to the polls, or cast a provisional ballot that, after being properly validated, will be counted on the same terms as all other votes. *See* Ind. Code §§ 3-11-8-25.1(d); 3-11.7-5-1; 3-11.7-5-2.5. The provisional-ballot process does not inflict cognizable injury unless there is a constitutional right to vote in-person at the polling place (which there is not).

And, again, there is no reason to infer that the Democrats or candidates Crawford and Simpson would necessarily have the consent of any such hypothetical voters to assert their rights in this lawsuit. It may be that candidates can assert the

rights of their voting supporters in some cases, but only where the law they challenge regulates the candidates as such and not where, as here, the Law regulates the candidates only insofar as they are also voters. *Cf. Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003) (allowing candidate to assert free-speech rights of supporters in challenging a campaign-disclosure law); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973) (allowing candidate to assert rights of voters in challenging a resign-to-run law).

2. The Seventh Circuit did not even bother to comment on the district court's theory of standing. Instead, it cut right to the chase and theorized that the Voter ID Law would likely cause Democratic voters more harm than Republican voters, and thus the Democratic Party would likely have to work harder to get its "members" to the polls on election day. Pet. App. 3-4. The court made these inferences notwithstanding (1) the lack of any evidence showing any particular groups would be harmed by the Voter ID Law and (2) the express concession of the Indiana Democratic Party that it has no "members."[5] Dem. C.A.7 Br. 12, 27; Dem. C.A.7 Reply Br. 1-4.

The Seventh Circuit relied only on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), which held that a fair-housing-advocacy corporation suffered Article III injury if, as alleged, it devoted more resources to counteract racial-steering practices. Pet. App. 4. Key to the *Havens* holding, however, was the fact that Congress, by statute, had specifically bestowed upon "all" persons both a right to truthful information about housing and the right to sue violators regardless whether the injury arose from conduct that violated someone else's FHA rights. *See Havens*, 455

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[5] The other Democratic Party apparatus in the case, the MCDCC, does have members—four of them to be exact. Pet. App. 77. However, the MCDCC admitted that all four of its members have proper photo identification. Pet. App. 77.

U.S. at 373, 376 n.16. Here, unlike in *Havens*, no statute grants the Democrats (or any other plaintiff) a right that any defendant has violated. Furthermore, as the district court observed, *Havens* addressed standing based on an assumption about expenses *already* incurred because of a defendant's *violations* of a statute, not expenses an organization might hypothetically one day undertake in response to a defendant's *enforcement* of a statute. Pet. App. 87-88.

The Seventh Circuit admitted that standing was even "less certain" for the remaining Petitioners. Pet. App. 4. Substantial Article III and prudential standing questions thus remain. In all events, the Court should wait for a voter-identification case where it is sure to be able to reach the merits.

B. The 2008 elections are a reason to *deny* review

Petitioners argue a need for immediate review prior to the 2008 national elections, but they neglect the countervailing significance of the 2008 primaries. Pet. 15. By the end of February 2008, well before this case would be decided on plenary review, 24 States and the District of Columbia will already have held presidential primaries. *See* 2008 Presidential Nominating Calendar, *available at* http://www.nass.org/index.php?option=com_docman&task=doc_download&gid=92 (last visited August 2, 2007). Fourteen of these States require some form of identification for all voters, and the rest require identification of first-time voters who register by mail, per HAVA. *See* Voter ID Laws, *available at* http://www.electionline.org/Default.aspx?tabid=364 (last visited July 29, 2007). Granting review here would create new uncertainty as to the validity of all voter-identification requirements, far more uncertainty than exists now when the only federal circuit to review a voter photo-identification law has upheld it.

Such uncertainty may well encourage additional pre-enforcement challenges to voter-identification procedures in the months and weeks preceding the 2008 primaries. In past elections, such challenges have generated conflicting last-minute court decisions along with electoral confusion. *See N.E. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (vacating district court's temporary restraining order issued 12 days before November 2006 election against Ohio absentee-voting identification requirements); *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 549-51 (6th Cir. 2004) (staying district-court injunctions issued one and two days before November 2004 election against Ohio polling-place challengers); *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004) (Stevens, J., as Circuit Justice) (denying for "prudential reasons" eleventh-hour applications to vacate *Summit County* stays).

This mode of adjudicating election laws quite obviously interferes with States' "compelling interest in preserving the integrity of [their] election process." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (holding that federal courts should "reasonably endeavor to avoid a disruption of the [States'] election process" when fashioning injunctive relief). Accordingly, in *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5, 7 (2006) (per curiam), the Court discouraged last-minute challenges to state election procedures when it vacated an injunction against Arizona's voter-identification law. The Court recognized both the "necessity for clear guidance to the State of Arizona," and the reality that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.*

Accordingly, if the Court is interested in finding the optimal time for reviewing a voter-identification law, it

should wait until *after* the 2008 elections. That way, at least, the mere pendency of review will not cast States and voters into turmoil and litigation that may itself depress turnout.

C. A later case may provide useful operational data

If the Court were ever interested in reviewing voter-identification laws, it would be better off to wait for a later case for the additional reason that there is no formal record here of the Indiana Voter ID Law's operational impact. Since this litigation began, to be sure, Indiana has implemented its Voter ID Law, and published reports suggest that voter turnout in Indiana *increased* by 2% in the November 2006 election as compared with the November 2002 election. *See* Ind. Sec'y of State, 2002 General Election Turnout & Registration, *available at* http://www.in.gov/apps/sos/election/general2002/general2002?page=turnout (last visited July 31, 2007); Ind. Sec'y of State, 2006 General Election Turnout & Registration, *available at* http://www.in.gov/sos/elections/2006%20Municipal%20Registration%20and%20Turnout.pdf (last visited July 31, 2007). But when it was filed, this case represented a pre-enforcement challenge, so no such operational data is in the record. To the extent the actual impact of voter- identification laws may be relevant, therefore, this particular case is not ripe for review.

A voter-identification case with a more complete record could arrive if all such laws operate unimpeded through the 2008 election cycle. At least then *some* data may be available to assess the alleged burden of such laws. *See Purcell*, 127 S. Ct. at 8 (rejecting plenary review because "the facts in these cases are hotly contested" and the inquiry is fact dependent); *id.* (Stevens, J., concurring) (observing that letting the challenged law operate would aid a "correct[]" resolution "on the basis of historical facts rather than speculation"). Here, however, the Court has only the speculative protests of the Law's political opponents.

CONCLUSION

The petitions should be denied.

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REPLY BRIEF

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In The Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RULE 29.6 DISCLOSURE STATEMENT

Petitioners refer to the Disclosure Statement contained in their petition.

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ARGUMENT

This case presents the question of whether the constitutionality of an identification requirement for in-person voting that severely burdens the voting rights of at least some voters depends on how many voters are actually prevented from casting a vote. The question is extremely important both doctrinally and politically. Due to the interest in, and proliferation of, such requirements throughout the United States, the question should be answered by this Court in advance of the 2008 national elections.

I. There is simply no evidence that justifies the State of Indiana's fraud concerns

There is no evidence that in-person voter impersonation fraud has ever occurred in Indiana. (App. 39). Instead, the State of Indiana argues that Indiana is a fertile area for such fraud because of the State's own failure to maintain its voter lists properly, allowing the lists to become inaccurate and bloated. The response to the State's management lapse should not be to discourage potential legitimate voters and to disenfranchise properly registered voters. Indeed, as this case was being briefed in the Seventh Circuit, the United States brought a lawsuit against the State of Indiana and the co-directors of the Indiana Election Division, resulting in an immediate Consent Decree under which Indiana and the defendant voting officials were required to comply with their mandatory duties under the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, to purge ineligible voters from the registration lists. *U.S. v. Indiana*, No. 1:06-cv-1000 RLY-TAB (S.D. Ind. June 27, 2006) (Joint Supplemental Appendix of Appellees in the United States Court

of Appeals for the Seventh Circuit at 1-8). Given that Indiana is finally going to comply with its duties under NVRA, Indiana can no longer be described as a fertile field for fraud.

Indiana also cites election reports from other states discussing occasional impersonation fraud. The reports are anecdotal and say nothing about Indiana's own experience. More significantly and persuasively, a recent detailed study of national claims of voter impersonation fraud has concluded that, "[v]oter fraud is extremely rare. At the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005." Lorraine C. Minnite, Ph.D., *The Politics of Voter Fraud,* PROJECT VOTE ["Minnite"] 3 (2007).[1] The Report notes further that "[t]he available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible." (*Id.*) Nineteen of these 24 convictions were not because of any impersonation fraud, but because the voters were not eligible to vote, either because they were convicted felons or non-citizens. (*Id.* at 8). The report further concludes that the lack of evidence of fraud is not because such fraud has not been codified as a crime or pursued, and that most allegations of fraud turn out to be something other than fraud. (*Id.* at 3, 9-11.) Thus, for example, although the State cites to voting problems in Wisconsin in 2004, further reviews disclose that "scrutiny from federal, state and local law enforcement and election officials produced several reports, an intensive review of voter registration practices . . . , many

[1] The study is not dated. However, it cites the Seventh Circuit's 2007 decision in this case, at 11, n. 15-16.

recommendations . . . and *very little conclusive evidence of voter fraud.*" (*Id.* at 35) (emphasis in original). And, in the Washington example cited by the State, voting irregularities appeared to be the product not of in-person impersonation voting fraud but of felons voting improperly and improper absentee ballots. *See Indiana Democratic Party v. Rokita*, No. 1:05-cv-00634-SEB-VSS, Docket No. 82, Ex. 4 at 9-11. Finally, the claims of fraud in Missouri's elections, again cited by the State, "have been disproved or significantly weakened by the discovery of major records management problems at the Elections Board." (Minnite at 30). In sum, despite the professed concerns about fraud, there is scant evidence that in-person voting fraud is a national problem. Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, April 12, 2007, at A1. And, there is absolutely no evidence, scant or otherwise, of in-person impersonation voting fraud in Indiana.

II. The Seventh Circuit's decision allows the right to vote to be severely burdened for a few citizens if not burdensome for too many, and this holding is contrary to, and destructive of, the personal right to vote recognized by this Court

Following the Seventh Circuit's lead, the State has sought to recast the test of *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to mean that, absent a substantive qualification that facially disqualifies voters or that infringes on other constitutional rights such as the constitutional prohibition against poll taxes, a severe burden on the right to vote for a minority of the population is subject to nothing but the most deferential scrutiny, provided that not too many

persons are so burdened. Applying this rule, the Seventh Circuit specifically held that the fewer the number of persons who will "disenfranchise themselves" by not obtaining the voter identification because of difficulty or impossibility, "the less of a showing that state need make to justify the law." (App. 5). There are at least two critical flaws with this approach.

First, the voter identification requirement can fairly be described as a new substantive qualification for voting in Indiana, potentially no less of an absolute preclusion than a residency requirement, *Dunn v. Blumstein*, 405 U.S. 330 (1972), or a property-holder requirement, *Hill v. Stone*, 421 U.S. 289 (1975). Indiana voters who are unable to successfully navigate the steps to obtain an identification card are not disenfranchising themselves, but have been disenfranchised by the identification requirement. Second, and more importantly, this is not the holding of *Burdick* and *Anderson*. These cases demand that a court not attempt to pigeonhole the substantive nature of the voting regulation, but instead first ask whether or not the fundamental right to vote "is subjected to 'severe' restrictions." *Burdick*, 504 U.S. at 434.

Severity is assessed at the level of the individual voter. Anything less would depreciate, and ultimately render meaningless, the right to vote, which is a "personal right . . . [that] is a value in itself . . . without more and without mathematically calculating [a citizen's] . . . power to determine the outcome of an election." *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989). The question must therefore be whether the voter identification requirement imposes a severe burden as to any voter or potential voter. It is not enough to say that a voter-identification law is not discriminatory because

most, but not all, citizens can, with a minimal amount of effort, comply with its terms. If, as the evidence demonstrates, and as the Seventh Circuit conceded, the Indiana law will prove to be a severe burden on some voters and "deter some people from voting" (App. 3), the law is unconstitutional unless it satisfies strict scrutiny.[2] The Seventh Circuit's holding misinterprets *Burdick* and *Anderson* by pre-ordaining that all voter identification laws, which by definition will burden only the small segment of the voting public that will have difficulty in obtaining the identification, will be subjected to the most deferential scrutiny.[3] This will allow the fundamental right to vote to be overcome by claims of fraud, like those here, that are unsupported by fact. Given the proliferation of voter identification regulations

---

[2] This does not mean that if an election regulation causes just one person to be unable to vote it automatically must be subjected to strict scrutiny. What it does mean is that the burden on the individual voter must be assessed as to whether it is unreasonable and a severe restriction as to that voter. As Judge Wood noted in this case, dissenting from the denial of the petition for rehearing en banc, "[e]ven if only a single citizen is deprived completely of her right to vote – perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification – this is still a 'severe injury' for that particular individual." (App. 154). But, "[o]n the other hand, some laws that place a minor obstacle to voting in the way of many citizens – perhaps one that prevents any person from voting who is not registered to vote 28 days in advance of the election – are rightly seen as 'reasonable [and] nondiscriminatory.'" (*Id.*)

[3] Judge Evans, dissenting from the panel's decision in this case identified the population that will be so burdened as "mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof." (App. 13). The new law's exclusion of absentee voters from the identification requirements also has race implications, as blacks are only half as likely as whites to vote absentee. John Mark Hansen, *Early Voting, Unrestricted Absentee Voting & Voting by Mail*, TASK FORCE ON THE FEDERAL ELECTION SYSTEM 3 (July 2001), available at http://www.tcf.org/Publications/ElectionReform/NCFER/hansen_chap5_early.pdf.

and proposals extant in America today, and the growing interest in them, this Court should grant plenary review at this juncture to remedy the doctrinal confusion evidenced by the Seventh Circuit's decision.

III. This is an appropriate case for plenary review and review should be granted prior to the national elections in 2008

As the petitioners demonstrated in their petition, the question of the appropriate test to evaluate voter identification laws is one that is essential to answer now, given the national interest that voter identification laws have provoked and will continue to provoke. The petitioners are proper parties to bring this question before this Court and the question should be decided at this time.

A. The petitioners have standing

There are no standing questions in this action. Petitioner Representative Crawford is a current office-holder and candidate who has been informed at town meetings and similar events that there are citizens who do not have the required identification to vote. Petitioner Simpson, also an office-holder and candidate, is aware that there are persons in his district who have voted in the past, but who do not now have the appropriate photo identification. (App. 53). Candidates for public office have standing to assert the right of voters inasmuch as harm to the potential voter translates to harm to the candidate. *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973); 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.9 n. 68 (2nd ed. 1984 and Supp. 2003).

Members of the petitioner Indianapolis Branch of the NAACP have stated that the Voter ID law will prevent them from voting. (App. 47). Petitioner United Senior Action has members who do not have birth certificates and has members who will be discouraged from voting because of the identification requirements. The organizations have standing to raise the interest of their members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

As a result of the voter identification requirement, petitioners Indianapolis Branch of the NAACP, Concerned Clergy of Indianapolis, and the Indianapolis Resource Center for Independent Living all will have to expend limited institutional resources to assist persons in obtaining the predicate documentation necessary to obtain identification cards. (App. 54, 55, 57). The goals of all these organizations are frustrated by hindering the ability to vote, and the organizations must spend resources to address this problem. This gives them standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

B. This case should be decided prior to the national elections in November of 2008

This case presents an extremely significant question of national importance that can, and should, be decided in advance of the national elections of 2008. It is true that there is a schedule of primaries prior to the election. Yet, given that primaries occur biennially, the State cannot suggest when an appropriate time to resolve this issue would be. The key must be to resolve the uncertainty surrounding the voter identification question promptly, and if possible, prior to the next general election. Justice

Douglas outlined the problem with waiting in his concurrence in *Ely v. Klahr*, 403 U.S. 108, 120-21 (1971) (Douglas, J., concurring),

> Primaries apart, there is always the problem of review by this Court. We are plagued with election cases coming here on the eve of elections, with the remaining time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented. If an election case is filed in our summer recess, we will not consider it until the first week in October; and our effort to note the appeal, hear the case, and decide it before November without disrupting the state election machinery is virtually impossible. The time needed is lacking.

There is time now to decide this issue without unduly disrupting the states' election machineries prior to the 2008 elections.

IV. Conclusion

The Constitution, art. I, § 4, cl. 1, allows Indiana to determine the "Times, Places and Manner of holding Elections for Senators and Representatives." However, this does not give Indiana the power to "evade important constitutional restraints" in constructing its laws governing elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). Plenary review must be granted because the panel decision in this case establishes a standard that allows for voter identification laws throughout the United States that unconstitutionally burden the right to vote.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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Nos. 07-21, 07-25

IN THE
Supreme Court of the United States

No. 07-21
WILLIAM CRAWFORD, *et al.*,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

No. 07-25
INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,
v.
TODD ROKITA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF STATE RESPONDENTS IN OPPOSITION TO THE PETITIONS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

SUPPLEMENTAL BRIEF OF STATE RESPONDENTS IN OPPOSITION TO THE PETITIONS

Pursuant to Supreme Court Rule 15.8, the State Respondents respectfully submit this Supplemental Brief in Opposition to the Petitions to bring to the Court's attention new authority that casts further doubt on the need for review in this case. In *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, __ F. Supp. 2d __, 2007 WL 2601438 (N.D. Ga. Sept. 6, 2007), the court upheld a Georgia law that, like Indiana's Voter ID Law at issue in this case, requires in-person voters to present government-issued photo identification at the polls.

1. The Brief of State Respondents in Opposition to the Petitions argues that review is not necessary because lower courts have applied a uniform federal constitutional standard to voter identification requirements. *See* State Opp. 11-12. The memorandum decision of the Northern District of Georgia in *Common Cause/Ga.* upholding Georgia's voter photo-identification law confirms that lower courts are having no problems applying existing Supreme Court precedent in this context. Indeed, it eliminates one of only two federal district court decisions invalidating voter-identification laws. *See* State Opp. 12 (citing *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006) (preliminary injunction); *ACLU of N.M. v. Santillanes*, 2007 WL 782167, at *25 (D. N.M. 2007) (final judgment, appeal pending)).

Just like the Seventh Circuit in this case, the court in *Common Cause/Ga.* ruled that "the appropriate standard of review for evaluating the 2006 Photo ID Act is the *Burdick* sliding scale standard," and not strict scrutiny. *See Common Cause/Ga.*, 2007 WL 2601438, at *44. Also just like the decision below, *Common Cause/Ga.* held that the "[p]laintiffs simply have failed to prove that the character and magnitude of the asserted injury to the right to vote

[caused by the Voter ID Law] is significant." *Id.* And, once again just like the decision below, *Common Cause/Ga.* ruled that States have a compelling interest in preventing in-person vote fraud. *See id.* at *47. Finally, expressly *following* this case on the issue of the State's burden to prove that in-person voter fraud actually exists, *Common Cause* held that "'the State is not required to produce such documentation prior to enactment of a law.'" *Id.* at *48 (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 755, 826 (S.D. Ind.2006)).

Thus, *Common Cause/Ga.* confirms that there is no need for Supreme Court guidance as to the proper constitutional standard to apply to voter photo-identification laws.

2. The *Common Cause/Ga.* decision also reinforces the State's argument that where, as here, there are no plaintiffs who have been, or who will be, stymied from voting, a challenge to a voter-identification law presents substantial Article III standing problems. *See* State Opp. 22-26.

The district court in *Common Cause/Ga.* actually ruled that *no* plaintiff had standing—it reached the merits only "out of an abundance of caution"—in circumstances strikingly similar to this case. *See Common Cause/Ga.*, 2007 WL 2601438, at *41. The standing-less plaintiffs included political groups, principally the Georgia NAACP, suing on behalf of themselves and their injured members, and two individual voters asserting their own injuries. *See id.* at *13-15, 19-20. The court concluded that none of the political-interest groups had standing (1) because none could prove they had any members injured by the Georgia law and (2) because the resource-reallocation injury found in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), does not apply to a political-interest group that is merely speculating as to how it might respond to the impact of a law unrelated to its core mission. *See id.* at *39-40. Furthermore, neither of the individual voters had standing because both testified they would obtain acceptable photo identification in advance of

the next election if the court upheld the Georgia law. *See id.* at *40-41.

Here, similarly, none of the political-interest groups or political parties has proven the existence of members injured by the Indiana Voter ID Law. Pet. App. 77, 82, 90-91, 101-03. Also, none has done anything but make predictions about how they might change their spending priorities in the wake of the Voter ID Law, which makes applying *Havens* inappropriate. Pet. App. 86-90. And as for the two individual voters—Plaintiffs Crawford and Simpson (who are also political candidates but have identified no injured supporters)—both *already* have acceptable photo identification. Pet. App. 83-84. Thus, there is no more injury here than in *Common Cause/Ga.*

The Georgia court's conclusions with respect to standing underscore another reason why this case is not cert-worthy. Were the Court to grant certiorari in this case, it is far from certain that, in view of the Petitioners' Article III standing problems, it could even reach the merits of the Indiana Voter ID Law. So, even if the Court were interested in examining a state voter-identification law (though no significant conflicts exist as to the validity of such laws under the U.S. Constitution), it should wait for a case where a challenger can actually demonstrate an injury.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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Dated: September 17, 2007

JOINT APPENDIX

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In The Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*, *Petitioners,*

v.

MARION COUNTY ELECTION BOARD, *et al.*, *Respondents.*

INDIANA DEMOCRATIC PARTY, *et al.*, *Petitioners,*

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*, *Respondents.*

On Writs Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

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Order of the United States Court of Appeals for the Seventh Circuit denying petition for rehearing, entered April 5, 2007 ..... (App. 150)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Crawford, et al. v. Marion County Election Board, et al. (No. 07-21)

May 25, 2005 – Defendant's Notice of Removal from Marion Superior Court filed in the United States District Court for the Southern District of Indiana, Indianapolis Division.

June 23, 2005 – State of Indiana's Motion to Intervene filed.

June 23, 2005 – Order of the district court entered, granting State of Indiana's Motion to Intervene.

June 23, 2005 – Minute Entry for proceedings held before the district court entered, parties stipulating to consolidation of Cause No. 1:05-cv-804 (*Crawford, et al. v. Marion County Election Board, et al.*) with Cause No. 1:05-cv-634 (*Indiana Democratic Party, et al. v. Rokita, et al.*) under cause number 1:05-cv-634.

Indiana Democratic Party, et al. v. Rokita, et al. (No. 07-25)

May 2, 2005 – Plaintiffs' Complaint filed in the United States District Court for the Southern District of Indiana, Indianapolis Division.

June 23, 2005 – Minute Entry for proceedings held before the district court entered, parties stipulating to consolidation of Cause No. 1:05-cv-804 (*Crawford, et al.*

v. Marion County Election Board, et al.) with Cause No. 1:05-cv-634 (*Indiana Democratic Party, et al. v. Rokita, et al.*) under cause number 1:05-cv-634.

Consolidated Cases (Nos. 07-21 and 07-25)

August 8, 2005 – Plaintiffs' motion for leave to file second amended complaint filed.

August 26, 2005 – Order of the district court entered, granting plaintiffs' motion for leave to file second amended complaint.

August 26, 2005 – Plaintiffs' second amended complaint filed.

October 31, 2005 – Crawford Plaintiffs' motion for summary judgment filed.

October 31, 2005 – Crawford Plaintiffs' memorandum in support of motion for summary judgment filed.

October 31, 2005 – Indiana Democratic Party Plaintiffs' motion for summary judgment filed.

October 31, 2005 – Indiana Democratic Party Plaintiffs' memorandum in support of motion for summary judgment filed.

November 30, 2005 – Crawford Defendants' cross-motion for summary judgment filed.

November 30, 2005 – Crawford Defendants' memorandum in support of cross-motion for summary

judgment and in response to plaintiffs' motion for summary judgment filed.

November 30, 2005 – Indiana Democratic Party Defendants' cross-motion for summary judgment filed.

November 30, 2005 – Indiana Democratic Party Defendants' memorandum in support of cross-motion for summary judgment and in response to plaintiffs' motion for summary judgment filed.

December 21, 2005 – Crawford Plaintiffs' reply in support of motion for summary judgment filed.

December 21, 2005 – Indiana Democratic Party Plaintiffs' reply in support of motion for summary judgment filed.

January 11, 2006 – Crawford Defendants' reply in support of cross-motion for summary judgment filed.

January 11, 2006 – Indiana Democratic Party Defendants' reply in support of cross-motion for summary judgment filed.

April 14, 2006 – Order and Judgment of the district court entered, granting defendants' cross-motions for summary judgment and denying plaintiffs' motions for summary judgment.

April 24, 2006 – Crawford Plaintiffs' notice of appeal filed.

May 5, 2006 – Indiana Democratic Party Plaintiffs' notice of appeal filed.

May 11, 2006 – Order of the United States Court of Appeals for the Seventh Circuit entered, consolidating Cause No. 06-2218 (*Crawford, et al. v. Marion County Election Board, et al.*) with Cause No. 06-2317 (*Indiana Democratic Party, et al. v. Rokita, et al.*).

January 4, 2007 – Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered, affirming the district court.

January 17, 2007 – Plaintiffs' petition for rehearing and petition for rehearing en banc filed.

April 5, 2007 – Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered, denying plaintiffs' petition for rehearing and petition for rehearing en banc.

July 2, 2007 – Petition for Writ of Certiorari filed by Crawford plaintiffs/petitioners.

July 2, 2007 – Petition for Writ of Certiorari filed by Indiana Democratic Party plaintiffs/petitioners.

October 1, 2007 – Order of the United States Supreme Court, granting the Petitions for Writ of Certiorari.

UNITED STATES DISTRICT COURT*
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, vs. TODD ROKITA, *et al.*, Defendants	CAUSE NO: 1:05-CV-0634-SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, vs. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Aug. 08, 2005)

Plaintiffs, Indiana Democratic Party and Marion County Democratic Central Committee (hereinafter

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

"Democrats"), by their undersigned attorneys, for their second amended complaint against Defendants, Todd Rokita ("Rokita"), J. Bradley King ("King") and Kristi Robertson ("Robertson") *and the Marion County Election Board (the "Board")*, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure state as follows:[1]

JURISDICTION

1. This Court has subject matter jurisdiction over Democrats' claims pursuant to 28 U.S.C. §§1331, 1343(a)(3) and 2201. Democrats bring this action under 42 U.S.C. §1983 and seek to redress the deprivation, under color of State law, of rights, privileges and immunities secured by the Constitution and laws of the United States belonging to those voters who associate with them.

PARTIES

Democrats are political party organizations dedicated to electing candidates of the Democratic Party to public office in Marion County, and throughout Indiana, and with which are associated hundreds of thousands of registered voters who regularly support and vote for candidates who are affiliated with the Democratic Party. Many of the registered voters associated with the Democratic Party are

[1] For the convenience of the Court and Defendants, all new verbiage in this Second Amended Complaint is in italics.

persons of color, elderly persons residing in retirement facilities, disabled persons, homeless persons, students, and persons with limited or no income or wealth who do not or cannot afford to drive and who do not possess drivers' licenses issued by the State of Indiana, but who are registered to vote and desire to have their vote counted in future elections.

3. Democrats have standing to assert the rights of those registered voters who associate with them and who will be voting, or who desire to vote, in future elections for public office, including the elections scheduled in May and November, 2006.

4. Many of these registered voters will be deterred or prevented from voting, or their votes will not be counted, because of the actions of Defendants Rokita, King and Robertson, *and the Marion County Election Board,* and those election officials acting in concert with them, to enforce the photo identification mandates of Senate Enrolled Act 483 (hereinafter "SEA 483"), which was signed into law by the Governor of the State of Indiana on April 27, 2005.

5. Defendant Rokita is the Indiana Secretary of State and in that capacity is the chief election official of the State of Indiana. I.C. § 3-6-3.7-1. He is also charged with performing all ministerial duties related to the administration of elections by the State. I.C. §3-6-4.2-2(a). He is also responsible, with Defendants King and Robertson, in the implementation of the Help America Vote Act ("HAVA"). I.C. §3-6-4.2-2.5. He also serves as chair of the state recount commission. I.C.

§3-12-10-2.1(b). He also certifies the election of candidates for United States Senator and United States Representative. I.C. §3-12-5-9.

6. Defendants King and Robertson are the co-directors of the Indiana Election Division of Secretary of State Rokita's office and are responsible for the administration of various election functions to assist Defendant Rokita in implementing state and federal election laws, including SEA 483. *I.C. §3-6-4.2-2(b).* Their duties include instruction of local election officials regarding their legal responsibilities under Indiana's Election Code, publishing and disseminating to the public and election officials brochures and

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants,	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor	

Motion for Summary Judgment by Plaintiffs William Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition of Housing and Homeless Issues, Joseph Simpson

(Filed Oct. 31, 2005)

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, v. TODD ROKITA, *et al.*, Defendants,	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

Affidavit of Robert Andrew Ford

(Filed Oct. 13, 2005)

Comes now Robert Andrew Ford, being duly sworn upon his oath, and says that:

1. I am a case manager at Horizon House in Indianapolis, Indiana.
2. Horizon House is a day center providing various services to homeless persons.

3. As a case manager I work with individual persons to attempt to assist them in resolving problems that they are facing as homeless persons.

4. I have worked with numerous clients concerning identification issues.

5. Not infrequently, clients lose their possessions either through theft or circumstance and come to Horizon House with no identification whatsoever.

6. I frequently try to assist the person in getting a copy of their birth certificate.

7. The first problem is the cost. In Marion County it is $10. Catholic Social Services will pay this cost. However, this service is certainly not a matter of public knowledge and there is no reason to believe that persons who are not advocates know that this service is available. The availability of this service is not advertised by Catholic Social Services, the Marion County Board of Health or the State Department of Health.

8. If the individual was born out of state it is extremely difficult for our clients to obtain a birth certificate. First, there is the cost factor and there are no organizations that I am aware of that regularly assist persons here with the cost of out-of-state birth certificates. Then there is the question of what further information is required by out of state keepers of vital statistics to obtain a birth certificate from that state. Frequently our clients literally have no types of identification.

9. For example, I am aware that birth certificates cost the following in the following states:

California -	$15
New York -	$30
Ohio-	$15
Michigan -	$26

10. Moreover, depending on the state, it may take months to receive an out-of-state birth certificate, even if the particular identification requirements to obtain the birth certificate are satisfied.

11. This lack of documentation is also a problem in Marion County. In order to obtain a birth certificate the individual must at least have a state identification card or Social Security Card or other items such as a credit card, bank card, or lease and a homeless person might not have any of these. They will then not be able to obtain a birth certificate, even if they have the $10. I have had clients who did not have sufficient identification to obtain a birth certificate from either the Marion County Board of Health or the State Department of Health.

12. I have also worked with my clients to try to get them valid identification cards from the Bureau of Motor Vehicles.

13. This has been extremely difficult. Not only has it cost money in the past in order to obtain an identification card, but the Bureau of Motor Vehicles requires, in addition, other information besides a birth certificate. I know from working with my clients that some of them do not have this secondary and other information and therefore they are unable to obtain even an identification card. Therefore; I am personally aware of persons who were not able to obtain identification cards.

14. This last election (November of 2004) Horizon House sponsored a voter registration drive at Horizon House. Many of our clients were reluctant to register and vote because they had the attitude that it would not make any difference. However, a significant minority did register, using Horizon House as their address, and voted.

15. On Election Day I went in a van with Horizon House clients to vote. One person was challenged and it took 1 ½ hours to get through the provisional ballot procedure with me assisting. It was clear to me that without my presence there that my client would have gotten discouraged and would have left without voting.

16. It is extremely stressful to be homeless and homeless persons are conditioned to avoid confrontation and stressful situations. Rather than face these types of situations, it is my experience that most homeless persons will avoid them.

17. Therefore, I believe it to be quite likely that a homeless person who is faced with a challenge to his or her ability to vote will not pursue his or her right to vote but will leave the poll rather than face a situation of confrontation.

18. Homeless persons in Marion County have severe transportation problems and if a homeless person does not have proper identification and must go to the poll, vote on a provisional ballot, go to the license branch to get identification, and then go to the Clerk's office, or even go to the Clerk's office only, the transportation difficulties will most probably prevent the homeless persons from doing what is necessary to have his or her vote counted.

19. As indicated above, it is quite stressful to be homeless and anything which makes voting more difficult will probably deter many, if not most, homeless persons from voting.

Declaration

I declare under penalty of perjury that the foregoing is true and correct. Executed on 9/26/05.

/s/ Robert A. Ford
Robert Andrew Ford

Prepared by:

Kenneth J. Falk
Attorney at Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, v. TODD ROKITA, *et al.*, Defendants,	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor	

Affidavit of Brenda Thompson

Comes now Brenda Thompson, being duly sworn upon her oath, and says that:

1. I am a case manager at Horizon House in Indianapolis, Indiana.
2. Horizon House is a day center providing various services to homeless persons.

3. As a case manager I work with individual persons to attempt to assist them in resolving problems that they are facing as homeless persons.

4. I have worked with numerous clients who were seeking to obtain identification.

5. Not infrequently, clients lose their possessions either through theft or circumstance and come to Horizon House with no identification whatsoever.

6. I frequently try to assist the person in getting a copy of their birth certificate.

7. The first problem is the cost. In Marion County it is $10. Catholic Social Services will pay this cost. However, this service is certainly not a matter of public knowledge and there is no reason to believe that persons who are not advocates know that this service is available. This service is not advertised to the public by Catholic Social Services, the Marion County Board of Health or the Indiana Department of Health.

8. If the individual was born out of state it is extremely difficult for our clients to obtain a birth certificate. First, there is the cost factor and there are no organizations that I am aware of that regularly assist persons here with the cost of out-of-state birth certificates. Then there is the question of what further information is required by out of out of state keepers of vital statistics to obtain a birth certificate from that state. Frequently our clients literally have no types of identification.

9. Moreover, depending on the state, it may take months to receive an out-of-state birth certificate,

even if the particular identification requirements to obtain the birth certificate are satisfied.

10. This lack of documentation is also a problem in Marion County. In order to obtain a birth certificate the individual must at least have a state identification card or Social Security Card or other items such as a credit card, bank card, or lease and a homeless person might not have any of these. They will then not be able to obtain a birth certificate, even if they have the $10.

11. I recently accompanied a homeless client who was trying to get a copy of her birth certificate from the Marion County Health and Hospital Corporation. She had a Social Security card but the employee at the Health and Hospital Corporation wanted more and informed my client that without further identification she could not obtain a copy of her birth certificate. We were then sent downtown to the Indiana Department of Health. The employee there was not willing to give my client a copy of her birth certificate until I informed the employee who I was.

12. It was quite clear that if I had not been there to advocate for my client she would have not been able to receive a birth certificate. Moreover, this required us to go first to the County Health Department at 3838 N. Rural Street and then downtown to the Indiana State Board of Health. I was providing the transportation. Otherwise, it would have been extremely difficult for my client to have done this.

13. It is my experience that my clients, when not assisted by an advocate, will frequently not be

able to navigate through agencies and bureaucracy to obtain such basic things as birth certificates or identification, even if the homeless persons have the underlying documents or information necessary to obtain the birth certificate or identification. I am therefore aware of persons who simply have not been able to obtain their birth certificates.

14. I have also worked with my clients to try to get them valid identification cards from the Bureau of Motor Vehicles.

15. This has been extremely difficult. Not only has it cost money in the past in order to obtain an identification card, but the Bureau of Motor Vehicles requires, in addition, other information besides a birth certificate. I know from working with my clients that some of them do not have this secondary and other information and therefore they are unable to obtain even an identification card.

16. My homeless clients have difficulty in obtaining transportation to move about Indianapolis. They frequently walk everywhere they go.

17. This means that even if they present themselves to vote and are challenged under the new identification law and are informed that in order for their ballot to count they must go get identification and then go to the Clerk's office, or even it they were to be told that they just had to go to the Clerk's office, homeless persons probably will not do so because of transportation difficulties.

18. Moreover, it is my experience that homeless persons generally avoid confrontation and stressful situations. Therefore, if a homeless person's

right to vote at a poll on election day is challenged, the homeless person will probably leave the poll and not try to vote despite the challenge.

19. It is extremely stressful to be homeless and a homeless person simply will take steps to avoid increasing the stress of his or her existence. This means that even if the homeless person wishes to vote, he or she will not do so if the voting experience is made difficult. This means that if the homeless persons must take extraordinary steps to vote, such as obtaining a birth certificate or identification, which, as indicated above, is not easy, he or she will not vote.

20. I am personally aware that there are homeless persons who have registered to vote and who wish to vote.

Declaration

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10-20-005.

/s/ Brenda Thompson
Brenda Thompson

Prepared by:

Kenneth J. Falk
Attorney at Law

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. 1:05-CV-00634-SEB-VSS

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,

vs.

TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,

vs.

MARION COUNTY ELECTION BOARD,
Defendant,

and

STATE OF INDIANA,
Intervenor.

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The deposition upon oral examination of **MICHELLE NIEMIER,** a witness produced and sworn before me, Linda Mayo Baynes, Notary Public, RPR, CP, CSR, in and for the County of Hamilton, State of Indiana; taken on the 8th day of September, 2005, at the offices of ClearPoint Legal, Inc., One Indiana Square, Suite 2525, Indianapolis, Marion County, Indiana; pursuant to Notice and the Indiana Rules of Trial Procedure. This deposition
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was taken on behalf of the Marion County Election Board in the above-captioned matter.

* * *

[23] Q. Okay. So somehow these 15,000 people found about your organization, how did that happen?

A. Most often, people learn of our organization, because there's been some activity at their group, we've been invited out to speak to their group of retirees, somebody's heard about us as word of mouth. Occasionally, we will get calls from people, because they've seen some news coverage of one of our actions and – or our issues that's been in the local press. And they want to get involved as well. I would say those are the two primary ways.

Q. Okay. Paragraph 38, it indicates that that many – the assertion is that many senior citizens may not have valid driver's licenses or state identification cards. Is this a – is this a assertion based on any facts of which you're aware?

A. It's based on my experience with the organization and conversations over the last 16 year of our members.

Q. Okay. Does your experience tell you enough to be able to estimate how many of [24] your members might fall into those categories?

A. No. I could not estimate the number.

Q. Okay. Has there been any kind of survey done, or are you – are you in the process or – or

thinking about even conducting such a survey to identify how much of your membership might fall into that category?

A. No. We do not have plans for that.

Q. Paragraph 39 indicates that many of your members will be discouraged from voting because of the new identification requirements under Senate Enrolled Act No. 483, even though they have voted in – in the past. Is that assertion also based on your experience, or is there other information that informs that?

A. That is also based on experience and conversation with our members.

Q. Okay. Have you had conversations since Senate Enrolled Act No. 483 has been passed from members saying that they're going to be discouraged about voting or– or from voting, rather?

[25] A. No. I've not spoken to any individual members that I will not be able to vote because of this, since it's enacted.

Q. Okay.

A. My – my point was that over the years, I know how difficult it has been for people I've spoken to, I do not have an exact number, who say for one reason or another they – they don't drive anymore, they don't have a driver's license anymore, and – and they rely on other people for transportation or can't

get out, so that I know that friends pick them up and take them, to voting places.

Q. Uh-huh.

A. I mean, again, this is anecdotal over the years. And I've – I've had people call my office. I – I can – I can remember distinctly one – one gentleman who was trying to obtain some service and – and he was required to try to obtain a birth certificate. Well, you know, he – he was born in Mississippi, he wasn't even sure what year he was born in, let alone try to figure out where – you know, whether a birth

* * *

[38] questions about other than anecdotal evidence or discussions with members that there's no hard dat – data or survey that – is there any hard data or survey that you're familiar with as to who is going to be able to vote (or not vote as a result of the –

A. No. United Senior Action does not maintain that. Again, in our opinion –

Q. Well, that's fine. I – I've got it. But what does that second part mean " . . . or who will find impediments to voting in their way because of the challenge law"? What did you mean by that?

A. I apologize. Please refer me again.

Q. Oh, I'm sorry. Read back to page 4?

A. Thank you.

Q. You see in the same answer, the second last sentence – of your answer.

A. Thank you.

Q. "We have members who will not be able to vote." We've discussed that. " . . . or who will find impediments to voting in their way because of the challenge law." What did you mean by that, "find impediments to voting"?

A. In our minds, impediments would

* * *

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al,. Defendants,	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

RESPONSE OF UNITED SENIOR ACTION TO INTERVENOR-DEFENDANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Comes now United Senior Action of Indiana, by Michelle Niemier, who, being duly sworn upon her

oath, responds to the Interrogatories served upon the organization. Further, Concerned Clergy of Indianapolis, by its counsel, files its response to the Request for Production of Documents served upon the Organization.

INTERROGATORIES

INTERROGATORY 1:

Please state the name, address, and organizational position of the individual(s) answering these interrogatories on behalf of the United Senior Action of Indiana.

ANSWER:

Michelle Niemier, Executive Director, United Senior Action of Indiana, 324 W. Morris Street, Indianapolis, Indiana, 46225, 317/634-0872.

INTERROGATORY 2:

Please define "members" as used by the United Senior Action of Indiana in paragraph No. 36 of its Complaint.

ANSWER:

Our members are people who join the organization by paying dues.

INTERROGATORY 3:

Please identify what information is maintained by the United Senior Action of Indiana on each of its members.

ANSWER:

We maintain members' names, addresses, phone numbers, donation histories, group affiliation, and their legislative districts.

INTERROGATORY 4:

Please identify any by-laws or written policies of the United Senior Action of Indiana that set forth the requirements for membership in your organization.

ANSWER:

The relevant portions of our by-laws are attached.

INTERROGATORY 5:

What records, if any, are kept by the United Senior Action of Indiana that identify:

1. The financial status of members of United Senior Action of Indiana.
2. Members of United Senior Action of Indiana who possess driver's licenses.
3. Members of United Senior Action of Indiana who possess photo ID.

4. Aggregate voting records of members of United Senior Action of Indiana

ANSWER:

We do not maintain any of these records.

INTERROGATORY 6:

Is the United Senior Action of Indiana claiming associational standing for its members or anyone else? If so, please identify for what injuries United Senior Action of Indiana claims associational standing.

ANSWER:

Yes, United Senior Action of Indiana is claiming associational standing. My attorney has informed me that under certain circumstances an organization can raise the injuries of its members. We have members who will not be able to vote or who will find impediments to voting in their way because of the challenged law. United Senior Action is raising these injuries for our members.

INTERROGATORY 7:

Is the United Senior Action of Indiana claiming a direct injury to itself? If so please state that injury with specificity.

ANSWER:

United Senior Action has a direct interest in seniors participating in the elective process to the greatest extent possible. United Senior Action is an effective advocacy organization only insofar as our members are committed voters. To the extent that our members' ability to vote is diminished, not only is their effectiveness as advocates diminished, but also so is the organization's effectiveness diminished. Therefore, United Senior Action is directly injured by the challenged statute.

* * *

AARP

Voter Identification in Indiana: A Demographic Analysis of Impact on Older Indiana Citizens

Prepared by Susan L. Silberman, Ph.D., AARP Knowledge Management

October 2005

Background In Spring 2005, the Indiana legislature passed Senate Enrolled Act 483. The bill requires voters to show a government-issued photo identification – including a driver's license, passport, state identification card, or military card – before they could cast a ballot in a general or primary election. Voters who do not have identification could vote provisionally; their votes would count only if they went to their county election board within a week and presented a photo identification or a signed affidavit indicating they could not afford to obtain an identification or had religious objections to having a photo taken for identification.

The debate around the new law has been fierce. Lawmakers supporting the bill assert that stricter voter identification efforts will help combat voter fraud, shore up public trust in the election system, and ensure fair elections. Those who oppose the new law contend that it will discourage voting and is more likely to disenfranchise the poor, rural residents, the disabled, the elderly, and minorities. They compare the stricter voter identification laws to the days of poll taxes.

In an effort to further understand the potential impact of the new law on Hoosiers, AARP Indiana commissioned a survey to examine:

- Who has a valid Indiana State issued driver's license and
- Who has a valid Indiana State issued identification card

This brief is based on data from a telephone survey of 843 Indiana registered voters age 60 and older. It was conducted from September 27 through October 4, 2005. AARP Indiana commissioned Woelfel Research, Inc. to conduct a random digit dial (RDD) telephone survey of self-identified registered voters age 60 and older in Indiana. The sample included 800 Hoosiers age 60 and older with an additional sample of 43 Hoosiers age 80 and over. All respondents were contacted using an RDD methodology and screened for voter registration. The survey has a sampling error of +/- 3.38 percent[1]; the survey responses were weighted to reflect the distribution of age and gender among registered voters in the 60+ population in Indiana. Weighted responses to all survey questions are in the attached annotated questionnaire.

---

[1] The response rate is 14 percent and the cooperation rate is 95 percent. The response rate is Response Rate 3 and the cooperation rate is Cooperation Rate 3 from the following publication: The American Association for Public Opinion Research. 2000. *Standard Definitions: Final Dispositions of Case Codes and Outcome Rates for Surveys.* Ann Arbor, Michigan: AAPOR.

Highlights of Key Findings

- One in ten (10%) survey respondents currently do not have a valid Indiana State issued driver's license.
- Demographic groups differ. The populations less likely to have a valid Indiana State issued driver's license are detailed below[2].
  - Older respondents, those age 75+, are more likely than younger respondents to not have a valid state issued driver's license (60-74:6% vs. 75+: 16%)
  - Respondents who are non-White are more likely than those who are White or Caucasian to not have a valid state issued driver's license (Non-White: 30% vs. White: 9%).
  - Disabled respondents are more likely than the non-disabled to not have a valid state issued driver's license (Disabled: 19% vs. Non-disabled: 6%)
  - Those who say their health status is *fair* or *poor* are more likely than those who say their health status is *excellent/very good/good* to not have a valid state issued driver's license (Health status *fair or poor:* 18% vs. health status *excellent/very good/good*: 7%)
  - Survey respondents with household income of less than $20,000 are more likely than those respondents with household incomes of

[2] These differences are statistically significant at the 95 percent confidence interval.

$20,000 or more to not have a valid state issued driver's license (<$20K: 15% vs. $20k+: 6%).

- Respondents who live in cities are more likely than those who live in suburbs and the country to not have a valid state issued driver's license (Cities: 14% vs. Suburb/Country: 6%). Also, respondents who live in small towns are more likely than those who live in the country to not have a valid state issued driver's license (Small towns: 10% vs. Country: 5%).
- Survey respondents who say their political views are Moderate are more likely than those who are Conservative to not have a valid state issued driver's license (Moderate: 11% vs. Conservative: 6%)

- Three in ten respondents (29%) currently have a valid Indiana State issued identification card.
- Of the survey respondents who do not have a state driver's license or a state identification card, three in ten say they are *not very or not at all* likely to get a form of picture identification even if it was required to vote in state and national elections.[3]

* * *

[3] Twenty-seven individuals out of 843 (3%) do NOT have either a state driver's license or a state identification card. With such a small number of cases to analyze, there are no generalizations that can be made from these results.

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. 1:05-CV-00634-SEB-VSS

INDIANA DEMOCRATIC PARTY, et al.,

Plaintiffs,

vs.

TODD ROKITA, et al.,

Defendants.

WILLIAM CRAWFORD, et al.,

Plaintiffs,

vs.

MARION COUNTY ELECTION BOARD,

Defendant,

and

STATE OF INDIANA,

Intervenor.

The deposition upon oral examination of **MELISSA MADILL**, a witness produced and sworn before me, Kathleen L. Cast, Notary Public, in and for the County of Marion, State of Indiana; taken on the 9th day of September, 2005, at the offices of Clear-Point Legal, Inc., One Indiana Square, Suite 2525, Indianapolis, Marion County, Indiana; pursuant to Notice and the Indiana Rules of Trial Procedure.

This deposition was taken on behalf of the Marion County Election Board in the above-captioned matter.

* * *

[11] Q. Okay. I'm going to refer you to page 9, I believe. Actually, it kind of starts at the bottom of page 8, but the – the content is starting at page 9. It indicates – well, first of all, before we go – go down that road, tell me how you became involved in this lawsuit.

A. I actually testified on the bill – against the bill being passed.

Q. At the legislature?

A. At the legislature, and the impact that it would have on people with disabilities. And so when it was passed, I had great concern and with – actually heard through the grapevine that there was a lawsuit, and – and called – I think it was the Senior Action Coalition.

Q. Okay.

A. We – we connected, and they got me connected with Ken.

Q. And you got hooked up in the – into the lawsuit?

A. Right.

Q. When you testified, do you recall which particular committee that you testified [12] in front of?

A. I can tell you the room it was in, but I can't remember the - the committee.

Q. Okay. Do you remember what stage the legislation was in at the time you were testifying?

A. No.

Q. Okay.

A. I actually don't.

Q. Okay. Well, before we get into the details of this, why don't you tell me generally what your objections to Senate Enrolled Act 483 are?

A. I'm - I have great concerns that people with disabilities are going to face yet another barrier to be able to vote. And -

Q. Give me a second. I'm - I'm slow sometimes. I have to think through things. When you say, "I have great concerns," are they - are those concerns based on any particular facts or information of which you are aware?

A. Yes.

Q. Okay. Can you describe those for me?

* * *

[23] **but not specific to what those advocacy issues were.**

Q. Uh-huh. Did any of - the estimated ten to 15 people that - that you talked with, did any of them

indicate that the provisions of Senate Enrolled Act 483 would prevent them from voting?

A. They were concerned about their – the barriers that it would create for them to vote.

Q. So it was more of a general concern?

A. Yes.

Q. And I take it by your answer that – that nobody specifically communicated to you that they were not going to be able to vote because of this legislation?

A. No, no.

Q. Okay. How did it come about that – that you went to testify to the legislature on Senate Enrolled Act 483 on the subject matter of it? Did – I mean, how did your organization – or how were you identified as a person who should testify?

A. I self-identified.

Q. Okay. So you did – you chose on

* * *

[25] then, but –

A. I'll try not to let you.

Q. Good, good. Well, let's – let's just go ahead and talk about that right now then. You indicated that not only people within your membership contacted you about this, but that there were people who

you would provide service to, who also contacted you; is that correct?

A. People with disabilities did also, yes –

Q. Okay.

A. – contacted us, and parents of people with disabilities that contacted us.

Q. How many people do you think fell into that category, not – not actual members, but people beyond that who could be members that – or parents?

A. I'd probably say about another ten to 15 people.

Q. Okay. Did any of those individuals tell you that the effect of Senate Enrolled Act 483 would be that they would not be able to vote?

A. No. It was – they think.

* * *

[30] [Q.] With regard to paragraph 48 of Exhibit A, it says that, "Many of the members at the Indianapolis Resource Center for Independent Living will be discouraged from voting or from voting in person by Senate Enrolled Act No. 483."

Aside from the – the general [31] concerns about barriers – again, I – I guess, this is repeating the question I've already asked, but are there specific members who have told you that they are going to be discouraged from voting because of Senate Enrolled Act 483 becoming law?

A. Discouraged – you know, it would kind of depend on how you define "discouraged." It's basic –

Q. And you – you're free to define it how you want.

A. It's – it's basically been stated that it's yet another barrier we face in order to be able to vote.

Q. Again, well, discouraged does not in this context – or would you agree that discouraged does not mean prevention? I mean, has anybody said to you that they're going to be prevented from voting?

A. No. Because we make sure if they said that, that we'd somehow fix the situation and get them to the polls. I mean, this is not really about the people who know about the legislation; this is going to impact all the people that don't know [32] **about it.**

Q. Okay. Well, it may be about the people who don't know about it, but, at least, in this assertion in paragraph 48, you're talking about your membership.

Are – are you saying the members don't know about this at this point?

A. Which are people with disabilities. Some of the members, I'm certain don't know about this.

Q. What – what have you done in terms of communicating the provisions of Senate Enrolled Act 483 to your membership?

A. It went out in our last newsletter.

Q. Okay. And when was that?

A. The newsletter I – I received the newsletters on Friday.

Q. Uh-huh. So Friday the 2nd of September?

A. Uh-huh.

Q. And how often do you send out newsletters?

A. Every other month. There was also information in a previous newsletter – newsletter, just about different legislation,

* * *

DEFENDANT'S EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,	)	
Plaintiffs,	)	
v.	)	
TODD ROKITA, et al.,	)	
Defendants,	)	
	)	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al.,	)	
Plaintiffs,	)	
v.	)	
MARION COUNTY ELECTION BOARD,	)	
Defendant,	)	
and	)	
STATE OF INDIANA,	)	
Intervenor.	)	

RESPONSE OF INDIANAPOLIS RESOURCE CENTER FOR INDEPENDENT LIVING TO INTERVENOR-DEFENDANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION

Comes now Melissa Madill, Executive Director of the Indianapolis Resource Center for Independent

Living ("IRCIL"), being duly swam upon her oath, and by her counsel, and files responses to Intervenor-Defendant's Interrogatories and Request for Production of Documents.

INTERROGATORIES

INTERROGATORY 1:

Please state the name, address, and organizational position of the individual(s) answering these interrogatories on behalf of the Indianapolis Resource Center for Independent Living.

ANSWER:

Melissa Madill, Executive Director, Indianapolis Resource Center for Independent Living, 1426 W. 29th St., Suite 207, Indianapolis, Indiana, 46208.

INTERROGATORY 2:

Please define "members" as used by the Plaintiff in paragraph No. 45 of your Complaint.

ANSWER:

Under our current by-law, our members are the Board of Directors and the people with disabilities whom we serve.

INTERROGATORY 3:

Please identify any by-laws or written policies of the Indianapolis Resource Center for Independent Living

that set forth the requirements for membership in your organization.

ANSWER:

The current by-laws are attached.

INTERROGATORY 4:

Please identify the particular process the Indianapolis Resource Center for Independent Living used to make the conclusion in paragraph No. 48 of its Complaint that many of its members "will be discouraged from voting or from voting in person by Senate Enrolled Act (SEA) No. 483".

ANSWER:

This is based on our in depth understanding and knowledge of the community that we serve:

INTERROGATORY 5:

Please identify by name and address your members that "will be discouraged from voting or voting in person by SEA No. 483".

ANSWER:

We do not have the names of specific persons with disabilities who will be discouraged.

INTERROGATORY 6:

What records, if any, are kept by the Indianapolis Resource Center for Independent Living that identify:

1. The financial status of the members of the Indianapolis Resource Center for Independent Living.
2. Members of the Indianapolis Resource Center for Independent Living who possess driver's licenses.
3. Members of the Indianapolis Resource Center for Independent Living who possess photo ID.
4. Aggregate voting records of members of the Indianapolis Resource Center for Independent Living.

ANSWER:

We do not have such records.

INTERROGATORY 7:

Is the Indianapolis Resource Center for Independent Living claiming associational standing for its members or anyone else? If so, please identify for what injuries the Indianapolis Resource Center for Independent Living claims associational standing.

ANSWER:

Yes. IRCIL is claiming associational standing. My attorney has informed me that under certain circumstances an organization can raise the injuries of its members. We have members who will not be able to vote or who will have great difficulty in voting because of the challenged law. IRCIL is raising these injuries for its members.

Additionally, my attorney has informed me that a party in a lawsuit may raise the interests of others where the party has a close interest to the third party and there is some hindrance to the third party raising those claims. IRCIL represents many persons who do not have the means or abilities to raise issues for themselves. The issues raised by this case are a perfect example of a situation where IRCIL needs to raise claims for persons who are unable to raise them themselves.

INTERROGATORY 8:

Is the Indianapolis Resource Center for Independent Living claiming a direct injury to itself? If so, please state that injury with specificity.

ANSWER:

Yes. The effectiveness of our advocacy, and that of our members, is dependent on elected officials perceiving persons with disabilities as a voting block to be reckoned with. The statute we are challenging in this case threatens IRCIL's effectiveness because it will make it more difficult for disabled persons to vote. This, in turn, will hinder IRCIL's effectiveness.

* * *

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. 1:05-CV-00634-SEB-VSS

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,

vs.

TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,

vs.

MARION COUNTY ELECTION BOARD,
Defendant,

and

STATE OF INDIANA,
Intervenor.

~~~~~~

The deposition upon oral examination of **RODERICK E. BOHANNAN,** a witness produced and sworn before me, Kathleen L. Cast, Notary Public, in and for the County of Marion, State of Indiana; taken on the 9th day of September, 2005, at the offices of ClearPoint Legal, Inc., One Indiana Square, Suite 2525, Indianapolis, Marion County, Indiana; pursuant to Notice and the Indiana Rules of Trial Procedure. This deposition was taken on behalf
~~~~~~

of the Marion County Election Board in the above-captioned matter.

* * *

[18] Q. And that was a broad question. Did you have any conversations relating to whether or not a member had the required identification after it became law?

A. If you're asking me, if I asked people, do they have identification defined by the statute, no, I did not. If you ask me whether people say, I don't think I'll be able to vote the way the stat – the way the statute is construed, yes.

Q. Okay. Okay. It's – do you have an [19] idea how many people would have fit into that second category?

A. No, I mean, we didn't – I didn't keep a tally.

Q. Okay. Have you done – and I gather from that, that you haven't done any kind of survey of your membership to determine how many people might be affected?

A. No.

Q. And even though you do recall having had conversations like this with members, you don't remember a specific member who may have had this conversation with you.

A. No. And there's a reason we don't.

Q. Okay. Well, why is that?

A. Because historically, African-Americans, in the meetings – specifically their experience in the south and their experience in voting and their experience in terms of difficulty voting, we have a policy that if people come to us with problems or ask us about things, we don't take down their name and number, because people would then not come forward and discuss with you or ask questions or get information or ask [20] **to be involved. That experience level still permeates even to this day.**

Q. So you preserve their anonymity in hopes that, that more people will come forward with problems, if they have problems?

A. That's correct.

Q. Okay. Because somebody like me might want to know who all those people are and then may to talk to them, is this –

A. That's correct. And I'm sure you're aware of the media cases have to deal with it.

Q. Okay.

A. NAACP – and membership and identification.

* * *

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants,	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

INDIANAPOLIS CHAPTER OF THE NAACP'S RESPONSES TO INTERVENOR-DEFENDANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION

Comes now the Indianapolis Chapter of the NAACP, by its designate, Roderick Bohannon, who,

being duly sworn upon his oath, responds to the Interrogatories served upon the organization. Further, the Indianapolis Chapter of the NAACP, by its counsel, files its response to the Request for Production of Documents served upon the Organization.

INTERROGATORIES

INTERROGATORY 1:

Please state the name, address, and organizational position of the individual(s) answering these interrogatories on behalf of the Indianapolis Branch of the NAACP.

ANSWER:

Roderick Bohannon, c/o NAACP, Julia Carson Center, 300 E. Fall Creek Place, Indianapolis, Indiana, 46205.I am the immediate past President of the Indianapolis Chapter of the NAACP and I am currently the head of the Chapter's Legal Redress Committee.

INTERROGATORY 2:

Please define "members" as used by Indianapolis Branch of the NAACP in paragraph No. 63 of its Complaint.

ANSWER:

Our members are persons who join the NAACP and pay membership dues annually.

INTERROGATORY 3:

Please identify any by-laws or written policies of the Indianapolis Branch of the NAACP that set forth the requirements for membership in your organization.

ANSWER:

There are written by laws put out by the national office of the NAACP. I am in the process of trying to obtain these.

INTERROGATORY 4:

Please identify the particular process that your organization utilized to identify those members of your organization that will have pay to obtain original copies of birth certificates to get photo identification from BMV.

ANSWER:

The Indianapolis Chapter of the NAACP did not specifically identify such members.

INTERROGATORY 5:

Please provide the names and address of those members of Indianapolis Branch of the NAACP that you have identified that will need to purchase a copy of their birth certificate in order to vote.

ANSWER:

The Indianapolis Chapter of the NAACP did not specifically identify such members.

INTERROGATORY 6:

What records does Indianapolis Branch of the NAACP maintain that allow you to measure "its political effectiveness" referred to in paragraph No. 68 of your Complaint.

ANSWER:

There are no such records and there is no easy way to measure this. But, it is clear form the history of both the NAACP and the civil rights movement in generals that political power enhances the ability of civil rights organizations to be effective. Therefore, if the political power of minorities is compromised, the effectiveness of civil rights organizations is diminished.

INTERROGATORY 7:

What records, if any, are kept by the Indianapolis Branch of the NAACP that identify:

1. The financial status of members of the Indianapolis Branch of the NAACP.
2. Members of the Indianapolis Branch of the NAACP who possess driver's licenses.
3. Indianapolis Branch of the NAACP who possess photo ID.
4. Aggregate voting records of the members of the Indianapolis Branch of the NAACP.

ANSWER:

The Indianapolis Branch of the NAACP does not have such records. We keep only information as to our members' names and addresses and information as to their dues paying status.

INTERROGATORY 8:

Is the Indianapolis Branch of the NAACP claiming associational standing for its members or anyone else? If so, please identify for what injuries the Indianapolis Branch of the NAACP claims associational standing.

ANSWER:

Associational standing is based on the fact that the challenged statute will make it more difficult for

persons, particularly minorities, from voting. This is the injury.

INTERROGATORY 9:

Is the Indianapolis Branch of the NAACP claiming a direct injury to itself? If so please state that injury with specificity.

ANSWER:

Yes, the NAACP is claiming direct injury to itself. As indicated above the strength of the NAACP and its branches is dependent upon the political clout of African-Americans and other minorities and to the extent that these persons are deterred from voting it injures the NAACP and its branches inasmuch as it renders the NAACP and its branches less effective in arguing their issues.

* * *

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. 1:05-CV-00634-SEB-VSS

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,

vs.

TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,

vs.

MARION COUNTY ELECTION BOARD,
Defendant,

and

STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of **MARGIE OAKLEY,** a witness produced and sworn before me, Kathleen L. Cast, Notary Public, in and for the County of Marion, State of Indiana; taken on the 9th day of September, 2005, at the offices of Clear-Point Legal, Inc., One Indiana Square, Suite 2525, Indianapolis, Marion County, Indiana; pursuant to Notice and the Indiana Rules of Trial Procedure. This

deposition was taken on behalf of the Marion County Election Board in the above-captioned matter.

* * *

[14] requirements, anything like that?

A. No. No, we just vote them in.

Q. Are they dues paying members, or are you a member just by vote?

A. Yeah, we have a membership fee and then monthly dues, because we cater breakfast every morning for the members. So catering stuff have to be paid for the food.

Q. Okay. If you could refer to Exhibit A, which you have in front of you, that's the other document.

A. Oh, this one?

Q. Yeah.

A. Okay.

Q. Do you recognize Exhibit A?

A. Yes.

Q. And what is that document?

A. It's the complaint that was filed.

Q. Okay. In the – in the matter concerning Senate Enrolled Act 483?

A. Yes.

Q. I'd like you to turn to page 10, which specifically addresses some of the issues or the issues that Concerned Clergy has identified as part of this lawsuit. In

* * *

[16] So they would also end up, more than likely, having to take a day off from work, in order to obtain this information.

And then, too, some people are not from here. And from experience, obtaining a birth certificate out of state is a little more difficult than getting one here –

Q. Uh-huh.

A. – and is more costly.

Q. At any point either during the – the course of this litiga – or legislation passing through the legislature or to the present day, have any of your members come to you and said that – or expressed their con – concerns, first of all, about Senate Enrolled Act 483?

A. It's a fact that was discussed at a full meeting.

Q. Okay, it was discussed at a full meeting. Have any members of the Concerned Clergy indicated to you that they don't have photo identification?

A. No.

Q. Have any members of Concerned Clergy indicated to you, or the organization at the [17]

meetings, that they would be discouraged from voting because of Senate Enrolled Act 483?

A. Yes.

Q. Who would that have been?

A. We have a couple of members. One of them's name is Pat. And I talked to Al Rhodes and he was particularly bothered by the fact. And basically it was because most members have lived in their neighborhood for a number of years, and they vote at the same place all the time. In fact, I don't like it, personally.

Q. Let's – let's discuss, first, their concerns about – I mean, they – they've been voting the same place for a long time and have lived in the area. What about Senate Enrolled Act 483 offends them?

A. Well, from experience when you've lived somewhere 20, 30, sometimes 40 years, everybody at the precinct knows you, because nine times out of ten, they use the same board people. And most people are just used to walking in, giving their name and – and voting. So they feel like it's almost like not being trusted to do the right thing.

* * *

[19] Those things are hard on people when you're poor. And then, when you add something like this, they feel it's unnecessary, and they just will give up. The stress of everyday living and surviving is enough.

And when you throw something else in there, they'll just throw up. They'll give up. And I understand where they're coming from.

Q. Okay. Let's – let's focus on you, again, for a second. Do you have a driver's license?

A. Yes, I do.

Q. Okay. If this law withstands the – the court challenge that it faces currently, and is law in the primary of 2006, is – or will you vote in the primary in 2006?

A. Uh-huh, because I'm a fighter.

Q. And when you say uh-huh, you mean "yes"? Is that what you –

A. Yes, I'm a fighter. I'm sorry.

Q. And I'm very familiar with the fact you're a fighter and respect that. And you won't have any – there – there won't be any problem

[20] MR. OSBORN: Well, strike that.

Q. Because the law requires that you will provide photo identification to the people at the polls?

A. Yes, but I'll complain about it.

Q. Okay. It won't prevent you from voting?

A. No, I'll vote and complain all at the same time.

Q. Has there been anybody who has told you that it – that it will prevent them from voting?

A. No. But hav – from experience having worked the polls, not only on the board, but as a poll watcher, and I used to be a vice precinct person, I have seen people challenged at the polls, and then the just throw their hands up and say forget it, and walk away, even though they can fill out the affidavit.

And – and I know from personal experience, I have had to convince people, you know, to fill out the affidavit, go ahead and vote. Most of them, they'll throw their hands up and say, forget it, this is [21] too much of a hassle. I don't have to be treated like this. And they'll walk away.

We – we lose more than we get back. We don't convince very many to go ahead and fill out the affidavit and vote. Most of them just say forget it, you know, I don't have to go through this, and – and walk away. And I – I've – I've experienced that and witnessed that myself in the past.

* * *

DEFENDANT'S EXHIBIT G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	)
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	No. 1:05-CV-00634 SEB-VSS

RESPONSES TO INTERROGATORIES AND REQUEST FOR PRODUCTION TO CONCERNED CLERGY OF INDIANAPOLIS

Comes now Concerned Clergy of Indianapolis, by Margie Oakley, who, being duly sworn upon her oath, responds to the Interrogatories served upon the organization. Further, Concerned Clergy of

Indianapolis, by its counsel, files its response to the Request for Production of Documents served upon the Organization.

INTERROGATORIES

INTERROGATORY 1:

Please state the name, address, and organizational position of the individual(s) answering these interrogatories on behalf of the Concerned Clergy of Indianapolis.

ANSWER: Margie Oakley, Secretary, Concerned Clergy of Indianapolis, 3721 N. Riley Street, Indianapolis, Indiana..

INTERROGATORY 2:

Please define "members" as used by Concerned Clergy of Indianapolis in paragraph No. 52 of your complaint.

ANSWER: The members of the organization are people who have joined and have been voted in to the organization.

INTERROGATORY 3:

Please identify any by-laws or written policies of the Concerned Clergy of Indianapolis set forth the requirements for membership in your organization.

ANSWER: The relevant by-laws are attached.

INTERROGATORY 4:

Please identify any activities or programs in which your organization is engaged that support your allegation in paragraph No. 54 of your Complaint that you "advocate(s) for voting rights and that persons exercise their right to vote."

ANSWER: Concerned Clergy is involved in numerous such activities. Among other things, we have been involved in voter registration activities, we participate in Operation Big Vote, we have members who work at polling cites, we produce a weekly radio show on Indianapolis radio station WTLC which has addressed numerous topics including voting rights and voter protection. Please see attached documents.

INTERROGATORY 5:

Please identify the particular process utilized by the Concerned Clergy of Indianapolis that supports its conclusion in paragraph No. 56 of your Complaint that Senate Enrolled Act No. 483 will discourage poor persons from voting.

ANSWER: This conclusion is the product of our experience as an Indiana based civil rights organization. The process used was therefore our experience.

INTERROGATORY 6:

What records, if any, are kept by the Concerned Clergy of Indianapolis that identify:

1. The financial status of the members of the Concerned Clergy of Indianapolis.
2. Members of the Concerned Clergy of Indianapolis who possess driver's licenses.
3. Members of the Concerned Clergy of Indianapolis who possess photo ID.
4. Aggregate voting records of the members of the Concerned Clergy of Indianapolis.

ANSWER: We have no such records.

INTERROGATORY 7:

Is the Concerned Clergy of Indianapolis claiming associational standing for its member or anyone else? If so, please identify for what injuries Concerned Clergy of Indianapolis claims associational standing.

ANSWER: My attorney has explained to me that an association has the right to file a lawsuit for its members where the members could bring a lawsuit, the interests of the members are relevant to the organization and it is not necessary for the individual members to participate in the lawsuit. I believe these requirements are met here. Our members include both ministers and interested persons in the community. A number of our members may not, at the current time, have the identification required by the new statute and therefore may not be able to vote. Additionally, our members object to having to show their identification cards to vote in polling places where they are well known.

Additionally, my attorney has informed me that a party in a lawsuit may raise the interest of others where the party has a close interest to the third party and there is some hindrance to the third party raising those claims. Concerned Clergy raises issues for poor persons who are not in a position to raise the issues for themselves. The issues raised by this case are a perfect example of a situation where Concerned Clergy needs to raise claims for persons who are unable to raise them themselves.

INTERROGATORY 8:

Is the Concerned Clergy of Indianapolis claiming a direct injury to itself? If so please state that injury with specificity.

ANSWER: Yes. Concerned Clergy is an advocacy organization dedicated to advancing, and advocating for, issues of interest to minorities and poor persons. To the extent that these groups have less political clout, Concerned Clergy will have less clout as well.

* * *

[SEAL] **CHECKLIST FOR BUREAU OF MOTOR VEHICLES BRANCH**
State Form 48169 (12-96)

THE FOLLOWING ITEMS ARE NEEDED IN ORDER TO COMPLETE YOUR TRANSACTION:	
	POWER OF ATTORNEY
	POLICE CHECK
	NOTARIZED AFFIDAVIT
	NOTARIZED BILL OF SALE
	DEATH CERTIFICATE
	NOTARIZED LIEN RELEASE
	SIGNATURE OF SELLER/SELLERS
	BODY CHANGE
	ODOMETER AFFIDAVIT
	COPY OF DIVORCE PAPERS
	NAME CHANGE OR ONE AND THE SAME FORM
X	OTHER proof of add.
Name of customer Kristjan Kogerama	
Name of clerk Wendy [Illegible]	Date 9-27-05
VALID FOR 10 DAYS	
DO NOT WAIT IN LINE AGAIN. PRESENT THIS FORM TO ANY AVAILABLE CLERK.	

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

Affidavit of Kristjan Kogerma

Comes now Kristjan Kogerma, being duly sworn upon his oath, and says that:

1. I am currently residing in Indiana.
2. I formerly lived in Ohio where I was registered to vote.
3. I am an adult.
4. I am currently homeless.
5. I went to the Bureau of Motor Vehicles on Virginia Avenue in Indianapolis on Tuesday, September 27, 2005 to obtain new identification.
6. I presented my birth certificate and Social Security card, but I was told that I could not obtain an identification card because I did not have anything on it with proof of my address.
7. I have attached the form I received.
8. Inasmuch as I am homeless, I have no address.

VERIFICATION

I verify, under the penalty of perjury, that the foregoing is true. Executed on: 9/28/05

/s/ [Illegible]

Prepared by:

Kenneth J. Falk
Indiana Civil Liberties Union

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. 1:05-CV-00634-SEB-VSS

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,
vs.
TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of **JOSEPH E. SIMPSON**, a witness produced and sworn before me, Linda Mayo Baynes, Notary Public, RPR, CP, CSR, in and for the County of Hamilton, State of Indiana; taken on the 8th day of September, 2005, at the offices of ClearPoint Legal, Inc., One Indiana Square, Suite 2525, Indianapolis, Marion County, Indiana; pursuant to Notice and the Indiana Rules of

Trial Procedure. This deposition was taken on behalf of the Marion County Election Board in the above-captioned matter.

* * *

[18] separately first.

Are – are you saying that if there are more people that vote in the election that you're going to get more votes?

A. Yes.

Q. Okay. And on what do you base that conclusion?

A. The fact is that, that's what election is all about, is obtaining as many votes to win, you know, as possible.

Q. No, I understand that. But you – what – what it seems to me that this paragraph is saying is that if there are more voters, then you would get those voters to support you?

A. Yes.

Q. And I'm asking you what leads to you that conclusion? I mean, is it possible, for example, that – that if someone else were to run against you, that – that more voters might all turn and vote for your opponent?

A. Any time you have a worthy opponent it does bring out more people, you know.

Q. Okay.

[19] **A. And – but I think that over my 12 years of running I've been able to maximize and continue to maximize each year because people begin to know who you are after each term and they feel comfortable to think that you're doing a good job, more people tend to want to come and vote for you.**

Q. So it's your experience as someone who has run for office a number of times that as the voters become more familiar with you, or the people who are are going to become voters become familiar with you, that you are likely to get their vote?

A. Yeah. My numbers from the first time I was on the board to where they are now is tot – is just, you know, a lot more.

Q. Okay. So it's increased over time?

A. Yes, its increased each year.

Q. You're interested in maximizing the number of persons who exercise their right to vote. Why – why are you interested in that?

A. Because I need to win.

Q. Well, I – that was the first part I think of the paragraph, but – but it sounds [20] as though the second part of it as – you are saying as a citizen, you're just interested in –

A. Get them more –

Q. – that happening.

What do you mean when is the – from that perspective, from the cit – perspective of a citizen, why is it in your interest?

A. Because I think people should have the right to vote, and – and that in my particular precinct I probably have 700 people, and it's been the same case when I was a precinct person. There were low turnout, and I think as the years went over – became, you know, as a precinct person who worked with these folks, to maximize, get the people to come out, I think, people are now beginning to show up. I've – I've a pretty good voting precinct now. And I want to continue that.

Q. Okay. Does that affect your ability to do your job as – as a township board member?

A. Yeah.

Q. How so?

[21] **A. If – if I don't get the numbers of votes, you know, to be able to win, I'm no longer there.**

Q. Okay. So from a purely pragmatic political viewpoint it's – it's important. Does it help you in any other way as – when you are actually – after you are elected, does it help you if there is a larger participation of the group of people who could vote for that particular office?

Is that convoluted?

A. Yeah.

Q. If more people – if more people participate, does that help you as an office holder in any way?

A. Yes.

Q. How so?

A. It lets me know that there is a lot of people paying attention.

Q. Okay. Paragraph 84, and that's on the next page, indicates that – that you are opposed, first of all, to – to showing your identification; is that right?

A. Correct

Q. You said earlier that you just went [22] through the process of renewing your driver's license?

A. Yes.

Q. So you actually have a current driver's license; is that correct?

A. Yes.

Q. When we get to the next election cycle, which would start – or at least the next election would be the primary of May – in May of 2006.

A. Uh-huh.

Q. Is your opposition to having to show identification going to keep you from showing your driver's license during the primary?

A. Repeat that.

Q. When you go to vote –

A. Uh-huh.

Q. – assuming you go to vote –

A. Uh-huh.

Q. – in – in the primary of 2006 –

A. Uh-huh.

Q. – will you use your identification as required under Senate Enrolled Act 483?

A. If I want to – I mean, if it's law, I will have to show it.

[23] Q. Okay. Assuming its law?

A. Yeah.

Q. You would show it?

A. Yeah.

Q. Okay. And there would be nothing – aside from – from your having to pull the – the license out of your wallet or wherever you keep it, would there be any inconvenience to you to show it to a precinct election board?

A. Yeah. I'm opposed to showing my ID to anybody that necessarily don't need to see it.

Q. Why are you opposed to that?

A. Because people can take your information and use it, you know. I mean, this is not a fair world, and there are a lot of fraud, you know, people taking your Social Security number, taking your basic information. All they need is basic Information. They can create another ID, and your credit report is pretty messed up. I mean, that's one of the common fear –

Q. Okay.

A. – that I have about showing my ID at [24] **– at any time. I understand when I go to a grocery store and I'm using my debit card or, you know, using charge card that is, you know, part of the requirement, because I want them to show – require them to show my ID in order to prove that I am who I am.**

Q. At a grocery store?

A. Yes.

Q. And why is that important then?

A. Because they need to know that I'm Joe Simpson.

Q. Okay. Now, the grocery store you're talking about, do you know the people at the grocery store?

A. No.

Q. Okay. So these are complete strangers to you, then?

A. Yeah. But they are in charge of me obtaining that groceries which I – I need very bad.

* * *

[79] Q. You were asked some questions concerning your knowledge of people in your [80] district who have voted in the past without possessing ID or who would object to showing ID. Had there anyone in your district come up to tell you that they objected to this –

A. Yes.

Q. – new law?

A. Yes.

Q. And what did they tell you?

A. That they felt that this was another mechanism to stop them from voting.

Q. And did they indicate to you they felt it would be difficult for them to comply?

A. No.

* * *

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,	)	
Plaintiffs,	)	
v.	)	
TODD ROKITA, et al.,	)	
Defendants.	)	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al.,	)	
Plaintiffs,	)	
v.	)	
MARION COUNTY ELECTION BOARD,	)	
Defendant,	)	
and	)	
STATE OF INDIANA,	)	
Intervenor.	)	

JOSEPH SIMPSON'S RESPONSE TO INTERVENOR-DEFENDANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION

Comes now Joseph Simpson, being duly sworn upon his oath, and by his counsel, and files responses

to Intervenor-Defendant's Interrogatories and Request for Production of Documents.

INTERROGATORIES

INTERROGATORY 1:

Please identify by names and address those voters in Washington Township that you assert in paragraph No. 81 of your Complaint that voted in the past but do not nave any photo identification and will be precluded from voting by implementation of Senate Enrolled Act (SEA) No. 483.

ANSWER:

I do not have specific names or addresses. However, I have been told this by a number of persons.

INTERROGATORY 2:

Please identify the particular process that you utilized to determine that voters in your precinct will become discouraged by the cost and inconvenience of obtaining the photo identification necessary to vote as alleged in paragraph No. 82 of your Complaint.

ANSWER:

I have been a precinct committeeperson for 18 years during which time I have worked at, and observed, the polls in my neighborhood. I have observed voters and voter behavior. I am aware of the identification

requirements demanded by both the health department and the Bureau of Motor Vehicles in order to obtain a birth certificate and identification. I used this knowledge and experience to draw the above conclusion.

INTERROGATORY 3:

Please identify by names and address the voters in your precinct that you determined will become discouraged from obtaining the identification required by SEA No. 483 because of the cost and/or inconvenience.

ANSWER:

I do not know the names of any such persons.

INTERROGATORY 4:

What is the causal relationship, if any, of maximizing the number of persons voting in your precinct and your own ability to be elected as referenced in paragraph No. 83 of your Complaint?

ANSWER:

I am a Democratic official in a precinct that has a majority of Democratic voters. The chances are that the more people who vote means that the more Democrats who will vote for me. Therefore, from a purely selfish perspective, I think the more people

who vote means the more people who vote for me. However, as I indicated in the Complaint I have a basic interest in maximizing the number of persons who vote, regardless of who they vote for.

INTERROGATORY 5:

What records, if any, are kept by Joseph Simpson that identify:

1. The financial status levels of voters in your precinct.
2. Voters in your precinct who possess Indiana driver's licenses.
3. Voters in your precinct who possess government-issued photo ID.
4. Aggregate voting records in your precinct

ANSWER:

I do not have any such records.

INTERROGATORY 6:

Is Joseph Simpson claiming associational standing for voters in his precinct or anyone else? If so, please identify for what injuries Plaintiff claims associational standing.

ANSWER:

I am not claiming associational standing because I am not an association. However, my attorney has indicated to me that a candidate clearly has standing to raise legal claims on behalf of voters and I therefore am raising the right of voters to be able to vote without unreasonable, unlawful and unconstitutional restrictions.

INTERROGATORY 7:

Has any State or federal agency issued a valid and current photo identification to you? Please specify the type and originating agency.

ANSWER:

I have a driver's license issued through the Indiana Bureau of Motor Vehicles.

INTERROGATORY 8:

Is Joseph Simpson claiming a direct injury to himself? If so please state that injury with specificity.

ANSWER:

Yes, I am claiming direct injury. As indicated above, as a candidate I am damaged by anything that will reduce the number of persons who may vote for me. The challenged statute will make it more difficult to vote and this damages me. Moreover, as a personal

matter I strongly object to having to show my identification when I have applied for and received a voter registration card after swearing to the truth of matters in the application. Moreover, I object to having to show my identification where I vote inasmuch as I am well known there.

* * *

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. 1:05-CV-00634-SEB-VSS

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,

vs.

TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs

vs.

MARION COUNTY ELECTION BOARD,
Defendant,

and

STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of **WILLIAM A. CRAWFORD,** a witness produced and sworn before me, Linda Mayo Baynes, Notary Public, RPR, CP, CSR, in and for the County of Hamilton, State of Indiana; taken on the 8th day of September, 2005, at the offices of ClearPoint Legal, Inc., One Indiana Square, Suite 2525, Indianapolis, Marion County, Indiana; pursuant to Notice and the Indiana Rules of Trial Procedure. This deposition was taken

on behalf of the Marion County Election Board in the above-captioned matter.

* * *

[31] requirements?

A. Those that have -

Q. Yeah, photo identification.

A. There's no inconvenience for me. I have driver's license and passport. Other than the offense of being compelled by the government to produce a photo ID to exercise the most basic and fundamental right that I have, the right to elect those who would govern me. And I find that inconvenient beyond the pale. There is no compelling governmental reason for them to do that in my mind. And to me, you know, it's a Boston Tea Party issue.

Q. Is it going to keep you from voting in 2006?

A. Absolutely not.

Q. Okay. You'll show ID if it's required at that time?

A. If that's the only way I will vote, I could vote, I will. But, hopefully, the courts will see the reason and knock this thing out.

Q. You indicate in Paragraph 33, which is on Page 8, that you plan to stand for [32] reelection in 2006, which I'm sure that there are many people who are very happy with that. And you have an interest in

ensuring that as many people in your district as possible have the opportunity and ability to vote.

Could you explain why that's of interest to you? I mean, there will be some of those people, will there not, who will vote against you or who could potentially vote against you?

A. Absolutely. But over the years, having gone through now 17 primary elections and 17 general elections, I generally find that the greater the turnout, the better, the more involved people get. And I have an interest in a great turnout.

And in particular, even if they vote against me – If large numbers of people vote against me, that's an indication, then, I'm not doing what the people want.

So, I have a great interest in a large turnout and would always try to get as many people as possible to the polls. A hundred percent if I could.

* * *

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

Plaintiff William R. Crawford's Response to Interrogatories and Request for Production of Documents

Comes now Representative William R. Crawford, being duly sworn upon his oath, and files his response to the Interrogatories served upon him by the State of Indiana, Intervenor. And, comes now Representative

William R. Crawford, by his counsel, and files his response to the Request for Production of Documents served by State of Indiana, Intervenor.

INTERROGATORY 1:

Please identify the persons in House District 98 who have voted in the past who do not have the picture identification required by Senate Enrolled Act (SEA) No. 483 of whom you have personal knowledge as alleged of in paragraph No. 29 of your Complaint.

ANSWER:

I do not have the specific names of my constituents. However, as the challenged statute was being debated in the General Assembly, and being discussed in the media, I was approached by numerous persons at community meetings and churches who specifically indicated that they had voted for years and they did not have the identification required by the new law. Constituents who stated that they had older relatives who did not have the required identification issued by the Bureau of Motor Vehicles, even though they had voted regularly, also approached me.

INTERROGATORY 2:

Please identify what particular process you utilized that supports your conclusion in paragraph No. 31 of your Complaint that voters in your district will not

vote or will be discouraged from voting because of the identification requirement contained in SEA No. 483.

ANSWER:

I have been watching the polls in Indianapolis for more then 40 years. It is apparent to me that voters are easily discouraged and if obstacles are placed in their way, either through challenges by persons at the polls or through additional requirements to vote, they simply will not vote. Therefore, the process I used to draw the above conclusion is my life experience.

INTERROGATORY 3:

If any particular process or survey was used please identify:

A. Who conducted the process;

B. The sampling used; and

C. The name and addresses of voters who indicated they will not vote or be discouraged from voting by operations of SEA No. 483.

ANSWER:

As I indicated above, I did not use any particular process other than a lifetime of experience with elections and voting.

INTERROGATORY 4:

Are you claiming associational standing for voters and potential voters who reside in the district you represent (House District 98) or anyone else? If so, for what injuries are you claiming associational standing?

ANSWER:

I am not claiming associational standing as I am not an association. However, my attorney has indicated to me that a candidate clearly has standing to raise legal claims on behalf of voters and I therefore am raising the right of voters to be able to vote without unreasonable, unlawful and unconstitutional restrictions.

INTERROGATORY 5:

Has any state or federal agency issued a valid and current photo identification to you? If so, please identify.

ANSWER:

I currently have a driver's license issued by the State of Indiana. I also have identification issued by the Indiana House of Representatives. However, it does not have an expiration date and, therefore, I do not believe it would be valid identification for purposes of the law challenged in this case.

INTERROGATORY 6:

Are you claiming a direct injury to yourself? If so please state that injury with specificity.

ANSWER:

I am claiming direct injury to myself. To the extent that the challenged statute makes it more difficult for persons to vote it means that there are less persons available to vote for me. To the extent that it discourages persons from voting it will diminish citizen's interest in the electoral process, which will injure me in my efforts to be re-elected. Additionally, I am personally offended about having to show identification to people who know me and in a polling place where I have voted for years. Being required to show the identification is direct injury. Furthermore, I have spent my entire adult life working for civil rights. I have a personal interest in insuring that the most precious of rights, the right to vote, is maximized and not reduced.

INTERROGATORY 7:

Please identify any records that are kept by you that identify:

1. The financial status of voters and potential voters in House District 98.
2. Voters and potential voters in House District 98 who possess driver's licenses.

3. Voters and potential voters in House District 98 who possess photo identification.

4. Aggregate voting records in House District 98.

ANSWER:

I do not have any such records.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, vs. TODD ROKITA, *et al.*, Defendants.	CAUSE NO: 1:05-CV-0634-SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, vs. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

APPENDIX OF EVIDENCE IN SUPPORT OF DEMOCRATS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 31, 2005)

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, vs. TODD ROKITA, *et al.*, Defendants.	CAUSE NO: 1:05-CV-0634-SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, vs. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

AFFIDAVIT OF THERESA CLEMENTE

(Filed Oct. 31, 2005)

Theresa Clemente, being first duly sworn upon his oath, deposes and says:

1. I was born in 1927 in Boston, Massachusetts, and lived there most of my life. I have been married

to my husband, Donald J. Clemente, for 53 years. I reside at 2215 Wawonaissa Trail, Fort Wayne, Indiana 46809. We had a car while in Boston which my husband used to get to work, but I never got a driver's license and relied on trolleys and cabs to get around town.

2. Fourteen (14) years ago we moved to Fort Wayne to be near our son, our only child, who is a veterinarian in this area. I did not get a driver's license after moving to Indiana.

3. Earlier this year I read in the newspaper that Indiana had passed a law requiring voters to have a photo ID in order to vote. I did not want to lose my right to vote, so I made a trip this past July to the Indiana Bureau of Motor Vehicle office at Southgate Mall in Fort Wayne. On my first visit, I brought along my Social Security card, my voter registration card, my property tax bill, a utility bill, and a credit card. However, when I arrived at the BMV branch I was told by personnel there that I needed a copy of my birth certificate before I would be issued a photo ID card.

4. I then returned home, got a copy of my birth certificate, and went back to the same BMV branch. This time, I was told that I needed to get a certified copy of my birth certificate, so I was turned away again without being issued a photo ID.

5. I then sent away to Boston for a certified copy of my birth certificate. I was told that it would cost me $28.00 to get a certified copy of my birth

certificate, so I sent a check for $28.00 along with my request. I then received in the mail a certified copy of my birth certificate 14 days later.

6. After receiving a certified copy of my birth certificate, I returned for the third time to the Southgate BMV branch. I was told by personnel that I still could not receive a photo ID because my birth certificate showed my name as Theresa Grady and I was now Theresa Clemente. I told BMV personnel that I was married and that my name had been Theresa Clemente for 53 years now. But for some reason, the BMV staff had filled out the paperwork for my ID using the name on my birth certificate, not the name on my Social Security card, credit card or utility bill, property tax bill or voter registration card. I was then told by BMV officials that I would have to produce a certified copy of my marriage certificate and I was turned away again without being issued a photo ID.

7. I plan to make a fourth trip to the local BMV branch with a certified copy of my marriage certificate to try once again to obtain a photo ID card so that I can vote in the next election.

8. I cannot speak for other persons, but I can say that my experiences in attempting to obtain a photo ID card from the BMV have been humiliating, time-consuming, and extremely frustrating. I certainly hope this is not the price I and others without state or federal issued photo identification will have to pay in order to continue to exercise our right to vote in the State of Indiana.

Further affiant sayeth not.

/s/ Theresa Clemente
Theresa Clemente

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Subscribed and sworn to before me, a Notary Public, in and for the State of Indiana, County of Allen, on this 4th day of October, 2005.

/s/ Robert M. Koehl
Printed: Robert M. Koehl
Notary Public

County of Residence: Allen
My Commission Expires: Oct. 31, 2009

[SEAL] OFFICIAL SEAL
ROBERT M. KOEHL
NOTARY PUBLIC – INDIANA
ALLEN COUNTY
My Comm. Expires Oct. 31, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, vs. TODD ROKITA, *et al.*, Defendants.	CAUSE NO: 1:05-CV-0634-SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, vs. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

AFFIDAVIT OF MARJORIE R. HERSHEY

Marjorie R. Hershey, being duly sworn upon her oath, deposes and states as follows:

1. I am a Professor of Political Science at Indiana University.

2. I was engaged by Plaintiffs Indiana Democratic Party and Marion County Democratic Party to analyze and provide a report on Indiana's new Photo ID Law for the purposes of determining its effect on Indiana voters and voter turnout.

3. Attached to this affidavit is a true and accurate copy of the report I prepared, entitled "Raising the 'Costs of Voting': What Will Be the Effect of Indiana's New Photo ID Law on Voter Turnout."

FURTHER AFFIANT SAYETH NOT.

I swear, under the penalties for perjury, that the foregoing representations are true to the best of my knowledge and belief.

/s/ Marjorie R. Hershey
Marjorie R. Hershey

STATE OF INDIANA)
) SS:
COUNTY OF MONROE)

Subscribed and sworn to before me, a Notary Public, in and for the State of Indiana, County of Monroe, on this 25 day of Oct., 2005.

/s/ Cheryl K. Ammon
Notary Public

County of Residence: Lawrence
My Commission Expires: March 18, 2008

CHERYL K. AMMON
NOTARY PUBLIC
STATE OF INDIANA
LAWRENCE COUNTY
MY COMMISSION
EXP. MAR. 18, 2008

Raising the "Costs of Voting": What Will Be the Effect of Indiana's New Photo ID Law on Voter Turnout?

Marjorie Randon Hershey
Professor of Political Science
Indiana University

September 12, 2005

Introduction: How Much Do We Know About Voter Turnout?

Political science researchers have been studying voter turnout for more than a century. We know more about it than almost any other aspect of American politics. The extraordinary attention devoted to turnout reflects in part the vital role of elections in any democratic state. It also stems from the ease of measurement and analysis; election results are public and votes are easy to measure, so it has generated a huge literature and a substantial amount of agreement on its findings. A very partial list of sources at the end of this report indicates the amount of research time and effort put into this area of study.

The purpose of this report is to detail the findings of turnout research relative to the following questions: Is the new law that requires all Indiana voters to present state or federally-issued photo identification prior to casting their ballot likely to affect voter turnout rates in the state? To what extent? Is such a requirement likely to affect some groups disproportionately relative to others? And how would such findings affect representation in the state of Indiana?

Even though the law has not been implemented at this time, we have many other types of analyses on which to base solid estimates of its probable impact. In fact, in judging the effects of any measure that is not yet in force, that must inevitably be our best means of prediction.

How Likely Is an Individual to Vote?

No act in a democratic political system is more important than voting. It is the means by which decisions of government are linked with the "consent of the governed," as the Declaration of Independence requires. The spread of the suffrage to groups of Americans who were not originally enfranchised was guided by a variety of considerations, including the belief that a government will be accountable to its citizens only if they have the right to remove its leaders from office. This fundamental right is the guarantor of the other basic rights in a democracy, including freedom of speech and of the press, the freedom to worship, and the right to be free from arbitrary treatment by agents of the government ("The Right to Vote," 2005).

The degree to which citizens exercise their right to vote – voter turnout – has long been considered a measure of the effectiveness of a democracy. In the United States, declines in voter turnout are often interpreted as evidence of problems in the functioning of the political system; low-turnout elections are frequently cited as raising questions about the legitimacy of public officials elected in them. Although

some have argued that low rates of voter turnout could signify widespread public satisfaction with the status quo (Berelson, 1954), this argument has been widely refuted (e.g., Walker, 1966). The United States Congress has spent a considerable amount of time devising legislation (including constitutional amendments 15, 19, 24, and 26, the Voting Rights Acts, and the National Voter Registration Act) to ensure that the right to vote is held by the vast majority of adult citizens and is not denied to citizens on the basis of irrelevant or pernicious criteria. As Alexis de Tocqueville wrote in his celebrated work *Democracy in America* (1835), "Once a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether. That is one of the most invariable rules of social behavior."

When political scientists examine voter turnout rates, the predominant approach is a rational choice or economic analysis. In this framework, people are likely to vote as long as the perceived costs of voting do not outweigh the perceived benefits. A classic formulation is that of Steven Rosenstone, an expert on electoral politics: "People participate in politics when they get valuable benefits that are worth the costs of taking part" (Rosenstone and Hansen, 2003, p. 10).

What kinds of costs might be involved in casting a vote? There are a variety of individual costs that must be paid. It takes time to get to the polls, to wait in line, and to cast a ballot. That time cannot be used to achieve other goals, so there are benefits forgone.

Most prospective voters need transportation to their polling place; thus they will pay costs in the form of gasoline prices or individual energy. In addition to the individual costs, there are structural barriers to voter participation. In every American state except North Dakota, people must register to vote, and in most states voter registration requires a separate trip to a different location than the one at which they will vote (and therefore information as to where that registration site is located), or an effort to locate a mail-in form with which to register, at a time when the election may not yet be generating the high levels of media coverage and public interest that facilitate information gathering. Residence requirements, physical barriers such as difficulties of accessibility to disabled persons, insufficient parking, too few voting machines relative to the size of the turnout, confusing ballot format – all of these are structural factors that raise the cost of voting to the individual. In short, anything that makes it less convenient to vote is a cost to the individual who chooses to exercise this fundamental right.

What, then, are the benefits of voting? Most voters feel a sense of obligation, civic pride, or community cohesion in casting a ballot. But although voting is a fundamental right in a democracy, it is clear to most citizens that in any given election, because of the large size of most constituencies, the likelihood that their single vote will make a difference in the election's outcome is very slim. There have been celebrated instances in which election

results have turned on a very small number of votes; the presidential election of 2000 is an excellent example. But these have been the exceptions; most elections are won by comfortable margins (Ansolabehere and Snyder, 2002)..

The result is what theorists call the "paradox of voting": voter turnout produces collective benefits for the whole community, such as a validation of the democratic character of the city or state, and a sense of legitimacy for the election results, but the actual value received by each individual from casting a ballot is relatively small and difficult to define with precision. It is an intangible benefit, whereas the costs paid to obtain it can be quite tangible. In a large electorate, this is likely to produce what is called the "free-rider problem" (Olson, Chapter 1): if the benefits of a particular action are collective, in that they will accrue to the whole community whether or not I participate, as opposed to an outcome that will guarantee benefits only to those who participate, and if the benefits I can personally expect from my participation will be intangible while the costs are measurable, then it is rational for me to abstain and let other members of the electorate pay those costs instead, because I will get the collective outcome anyway. As long as at least one person goes to the polls, the collective good of obtaining an election result will be met with or without my participation.

In such an activity, where the costs are perceptible though not large for many people, and the benefits are collective and intangible, "small changes in

costs and benefits alter the turnout decision for many citizens" (Aldrich (1993: 261). The decision to turn out to vote is made at the margin, and the determining factor will be the relative balance of costs and benefits. Because the benefits are likely to be the same for all voters, any increase in costs, however slight, should therefore affect the individual's likelihood of voting.

When the Costs of Voting to the Individual Are Raised, the Likelihood of Voting Goes Down.

Empirically, researchers have shown convincingly that the rules implemented to administer elections can encourage or depress voter turnout, and that where obstacles to voting are greater, turnout will be lower (see, for example, Wolfinger and Rosenstone, 1980, p. 61; Conway, 1991, Chapter. 4). As Thomas E. Patterson, director of the Vanishing Voter Project at Harvard University, writes, "Scholars are in full agreement that the more 'costs' placed on the potential voter, the lower the participation rate" (Patterson, 2002, p. 130). Similarly, a well-known student of comparative voter turnout concludes that "Where institutions generate disincentives to vote, turnout suffers" (Jackson, 1987: 419).

This has been apparent since the beginning of the American republic. In the first five American presidential elections (1788-1804), when transportation was primitive, information about where to vote was difficult to find, and getting to the polls could

involve a substantial investment of time and risk, only an estimated 4 to 6 percent of those Americans who were eligible to vote made it to the polls (Teixeira, 1987, p. 9). Note that the proportion of citizens who had the right to vote was small to begin with, but only a tiny slice of that eligible electorate actually turned out to vote. These elections were the earliest in our history, after Americans had fought a long and devastating war to obtain that right, so those eligible should have had no lack of interest or motivation to exercise it. Yet the costs of travel and information were sufficiently high to keep the turnout extremely low. As transportation systems improved during the next two decades, political information became more widely disseminated, and the electoral system ran more smoothly, turnout jumped to 27 percent in 1824, 58 percent in 1828, and 80 percent in 1840 (Halperin, 1999: 74).

Another painfully clear example of the finding that an increase in costs – even a small increase – will drive down voting turnout is the impact of election administration and electoral laws in the eleven southern states during the Jim Crow period, from the mid-1870s until the late 1960s. A series of hurdles of varying severity were placed in the path of black male Americans who had been enfranchised earlier by the Civil War Amendments, and black female Americans granted the suffrage by the 19th Amendment in 1920. Some of these burdens were disqualifying in themselves, such as the "white primary," in which the Democratic Party was defined as a private

association open only to whites, and there was no active Republican primary in which blacks could cast a vote. Others were relatively small burdens; the poll tax, for instance, was generally minimal, typically only a dollar or two, but had to be paid several months prior to Election Day and the receipt kept and shown at the polls, yet it was sufficient to keep large numbers of black Americans from voting. The combined effect of these costs of voting for blacks in the South was that throughout this period, and until the structural changes of the 1950s and 1960s began to reduce those costs, black turnout in Mississippi rose no higher than 5 percent, and in Alabama and South Carolina no higher than 13 percent.

Studies of the impact of electoral law on voting rates have shown for more than 40 years that increased costs of voting would drive down turnout. The 1963 Report of the President's Commission on Registration and Voting Participation, for example, concluded that one of the major reasons for nonvoting was the restrictive voting laws under which nonvoters were more likely to live.

One example of a provision that raises the costs of voting is the requirement that citizens register before being able to exercise their right to vote. Although the photo identification requirement in the new Indiana law at issue applies only to registered voters, research on the impact of voter registration laws is relevant here because it is directly analogous to the burdens posed by the new Indiana photo ID law. In the case of the new Indiana law, prospective

voters who do not possess state- or federally-issued photo identifications would be required to take an additional trip, most likely to their Bureau of Motor Vehicles office, to acquire one, and perhaps to take a second trip to obtain the necessary proof (in the form of a birth certificate) to get the state or federally-issued identification. Similarly, in the case of voter registration laws, prospective voters are required to take an additional trip to register to vote or to find out how to obtain a mail-in registration form and then to comply with its provisions and send it. In both cases, the requirements make voting more costly.

Wolfinger and Rosenstone (1980, p. 61) confirm that "Registration raises the costs of voting. Citizens must first perform a separate task that lacks the immediate gratification characterizing other forms of political expression (such as voting). Registration is usually more difficult than voting, often involving more obscure information and a longer journey at a less convenient time, to complete a more complicated procedure. Moreover, it must usually be done before interest in the campaign has reached its peak."

As Table 1 shows, most states require voters to register to vote at least 30 days in advance of Election Day, the maximum interval permitted by federal law. Six states have much more liberal registration requirements, however, allowing voters to register when they come to vote on Election Day; a seventh state (North Dakota) does not require voter registration at all. These states' rules minimize the inconvenience for

voters by eliminating the need to make a second trip for the purpose of registering.

How did these seven states, whose registration rules impose the least cost on prospective voters, rank in voter turnout levels in the 2004 elections? Five were in the top six states in voter turnout; the other two ranked 19th and 41st. In the 2000 presidential election, turnout in these seven states was 15 percent greater than in other states (Patterson, 2002, p. 133); in 2004, it was 9 percent greater. An average of 71.5 percent of voting-age citizens cast their ballots in 2004 in the seven states with Election Day registration or no registration at all, compared to a national average of 63.8 percent, and an average of 62.6 percent in states where registration was required at a separate time prior to Election Day.

Earlier studies also showed that the length of the interval between the close of registration and Election Day makes a difference in voting rates; Rosenstone and Hansen report (2003: 208), for instance, that "The longer before an election people must act to ensure their eligibility to vote, the more likely they will fail to do so. Compared to citizens who live in states that allow registration right up to election day, citizens who live in states with thirty-day closing dates are 3.0 percent less likely to vote. . . . Early closing dates, by requiring people to register long before campaigns have reached their climax and mobilization efforts have entered high gear, depress voter participation in American elections."

It might be argued that these findings occur because states with particularly civic-minded political cultures are both more likely to permit Election Day registration and also more likely to have higher voter turnouts. We can test for the possibility of spurious correlation by looking at change over time in states that have adopted Election Day registration; if their voter turnouts went up after the adoption, then it would seem that the reduced cost of voting made the difference. In fact, research shows (Fenster, 1994) that in Minnesota, Maine and Wisconsin, voter turnout rates increased *after* Election Day registration was permitted. Further, when national voter turnout declined in the 1976 presidential election, the two states using Election Day registration at that time, Minnesota and Wiwsconsin, actually experienced an increase in voter turnout (Smolka, 1977, p. 45). Because of these findings, Fenster (1994) estimates that if Election Day registration were implemented in all states, voter turnout rates across the nation would increase by 5 percent.

The costs imposed by voter registration also play a role in driving down American voter turnouts relative to those of other western industrialized democracies. During the 1980s, G. Bingham Powell found (1986: 23), an average of 80 percent of the eligible electorate in 20 developed democracies went to the polls, at a time when the average turnout in American elections was 54 percent. More recent surveys by the most trustworthy source of such comparative turnout statistics, the International

Institute for Democracy and Electoral Assistance (IDEA, a nonpartisan international organization supported by contributions from 23 member nations, including Australia, the Scandinavian nations, India, and Spain; http://www.idea.int/vt/intro.cfm), show a continuing differential between American voter turnout and that of most other industrialized democracies. The only democratic nation with lower voter turnout than that of the United States is Switzerland, and its low turnout reflects the fact that federal elections in Switzerland are not as consequential for policy decisions as are cantonal elections.

This differential cannot be explained by historical or cultural factors. The political culture in the United States has long been regarded as more supportive of political participation than the political culture of many democracies in Europe and East Asia. Political discussion is more frequent in the U.S. and campaign participation is higher than in most other democracies. So why is our voter turnout lower? Among the main reasons is that voter registration and other election laws contribute to lower turnout in the U.S. (Conway, 1991: 109). Halperin (1999: 71) argues that "the single most important reason for the drastic decline in voter turnout during the twentieth century stems from the burdensome and outdated voter registration laws most states implemented at the turn of [twentieth] century. If the statistics about voters and elections show any one thing clearly, it is that voter registration laws are the principal reason why so few people vote."

The election laws of many other democracies provide for automatic voter registration or government-conducted registration systems, in which, for example, people are automatically certified as eligible to vote when they come of age and obtain identity cards, or government-sponsored canvassers go from house to house before each election to enlist voters (Piven and Cloward, 2000, p. 17). The American system of voter registration, in which the citizen must take the initiative, is more difficult, complicated, and time-consuming than that of almost any other democracy. Of the 20 democracies in Powell's study, only France and the United States leave voter registration to the citizen's own initiative.

In short, researchers concur that the registration requirement, which is analogous to the requirement that prospective voters obtain government-issued photo identification in advance of going to the polls in the sense of having to make a separate trip or take a separate step (in the case of mail-in registration) to establish the credentials needed to exercise one's right to vote, drives down voter turnout, most likely by raising the cost of voting to the individual.

What Do We Know About the Magnitude of This Impact?

With regard to the magnitude of the effect of the voter registration requirement on voter turnout, Rosenstone and Hansen find that (2003: 206), "With the adoption of registration laws [in the late 1800s and

early 1900s], voter turnout in the North dropped 17 percent between 1896 and 1916." Powell (1986), in his comparative analysis of western industrialized democracies, concludes that in the 1970s, the need for US citizens to take the initiative themselves to register to vote (as opposed to the systems of automatic voter registration maintained by most other democracies) decreased voting turnout by 16 percent compared with turnout rates in other democratic nations.

Mitchell and Wlezien (1995: 188-189) show that if the costs of voter registration were substantially reduced, by such means as eliminating the closing dates for registration, increasing the hours that registration offices remain open, and regulating the purging of voter rolls, then there would be an estimated increase in voter turnout of 8.6 percent on average, and in some states, by more than 14 percent. Mitchell and Wlezien estimate that Indiana's voter turnout would show a 9.7 percent increase. So simple a step as expanding the open hours of voter registration offices would be likely to increase Indiana's voter turnout by 1 percent. Studies of the impact of the National Voter Registration Act of 1993 (the "motor voter" law) have found, using survey research, that turnout increases resulting from the law ranged from 4.7 percent to 8.7 percent (Highton and Wolfinger, 1998).

To what extent are these estimates relevant to the new Indiana photo ID law? A change in the voter registration system would clearly affect a greater proportion of citizens because all but one state require

all citizens to register to vote, whereas the new law would affect only those prospective voters who are already registered but do not have the type of government-issued photo identification required by the new law. Therefore the impact of the new law on voter turnout would be considerably smaller.

The impact would, however, also be considerably more targeted than that of a change in voter registration requirements. As the next section shows, citizens who lack government-issued photo identifications come disproportionately from groups that are already disadvantaged, and these groups are among those whom political science research has found to be least able to pay the costs of voting.

Increasing the Cost of Voting Affects Some Groups More than Others.

Some types of people are better able than others to accept increased costs of voting without being deterred from going to the polls. Rosenstone and Hansen (2003, page 209) point out that, "The legal restrictions on the exercise of the franchise adopted in the early part of the century and maintained to the present day place significant burdens on American citizens and lower the probability that they will participate in political life. Although neutral on their face, the conditions on the use of political rights burden the least advantaged much more than the most advantaged. In fact, restrictive election laws afflict minorities, the poor, and the uneducated twice

over: They make it doubly difficult for the disadvantaged to participate in politics, and they make it doubly doubtful that political leaders will devote the resources to efforts to mobilize them."

It is very well established in the turnout literature that socio-economic status (SES) is more closely correlated with voter turnout than almost any other demographic variable (Wolfinger and Rosenstone, Chapter 2): people with lower SES are substantially less likely to vote than are higher-SES people. Of the three components of SES (income, education, and occupational status), the strongest influence on turnout comes from the individual's level of education. According to the U.S. Census (*Statistical Abstract of the United States, 2004-2005*), only 23.6 percent of those who never attended high school voted in the 2004 election, compared with 34.6 percent of those with some high school education, 52.4 percent of high school graduates, 66.1 percent of those with some college education, 72.6 percent of college graduates, and 77.4 percent of those with postgraduate degrees. The monotonic nature of the relationship between education and voter turnout increases the likelihood of a causal connection.

Empirical studies have further demonstrated that variations in the costs of voting have the greatest effect on those with the least education (Wolfinger and Rosenstone, 1980, p. 62; see also Leighley and Nagler, 1984). The nature of the causal connection is also clear. People with higher education and greater income are more likely to have discretionary income,

a car to get to the polls, a flexible schedule to allow them to vote and to fulfill any other requirements pre-requisite to voting (such as obtaining the necessary photo identification), and access to the media of communication that tell them where to find their registration or identification center or polling place (Wolfinger and Rosenstone, 1980, pp. 20-22). People with more education and higher income also do not have to accept the opportunities forgone that poorer and less educated people do: going to vote (or to obtain a birth certificate or a photo identification) rather than working to pay the rent, for example. *It is significant that we do not find this correlation in most other western democracies, where the costs of voting are not as high.*

As Rosenstone and Hansen explain, their analysis of data from the American National Election Studies cumulative data file shows that "Early closing dates [for voter registration, which increase the costs of voting] have their greatest impact on the people who are least likely to vote anyway. Given that they lack the resources to overcome the costs of turning out, it is surely no surprise that they also lack the resources to offset the additional burdens of registration. Sixty-day closing dates reduce the turnout of the poorest Americans by 6 percent but depress the turnout of the wealthiest Americans by only 3 percent. They diminish the turnout of the grade-school educated by 6 percent but lessen the turnout of the college educated by only 4 percent. Early closing dates, finally, inhibit African-Americans,

Mexican-Americans, and Puerto Ricans slightly more than other citizens" (Rosenstone and Hansen, p. 208). They conclude (p. 208, note 90) that "little can be done to change the prospects of people who are almost certain to turn out, but much can be done to change the prospects of people who may or may not turn out." Comparative state studies also show that laws raising the cost of voting are a far greater impediment to poor and less educated people than they are to wealthy and more educated people (Kim, Petrocik, and Enokson, 1975: 107-131). The difference in turnout between states whose laws facilitate voter turnout and states whose laws do not averages about 7 percent (Kim, Petrocik, and Enokson, 1975: 199). In short, slight increases in the costs of voting can deter those with the least resources (see Patterson, 2002: 131).

In the new Indiana photo ID law (Senate Enrolled Act 483 signed into law April 27, 2005), precinct election officials would be required to ask all registered voters for proof of identification before they can vote. There is only one form of identification allowed: a document issued by either the United States government or the State of Indiana that contains a photo of the individual, carries an expiration date, and has the same name on it as is on the individual's voter registration record. Anyone without such identification can be given a provisional ballot, but that ballot will not be counted unless the prospective voter provides the required photo identification or executes an affidavit saying that he or she is

indigent and can't get the identification without paying a fee, or has religious objection to being photographed, and does so in person at the county election board or before the circuit court clerk before noon of the second Monday following the election. This deadline occurs long after results will be settled in nearly every election, which of course drives down even the small benefit to the voter of being able to believe that his or her ballot will be the deciding vote in the contest.

As is the case with the registration requirement's closing date, these new requirements carry costs that fall differentially on different groups of citizens. Among these costs are:

- the time needed to get the required identification, as well as the time and information involved in obtaining an affidavit of indigency at yet another separate location, if the citizen is unable to afford the cost
- the time needed to obtain documents prerequisite to the required identification, such as a birth certificate, which must be obtained at a different office from the state- or federally-issued photo ID
- the cost of the birth certificate
- the cost of transportation to and from each of these locations
- the cost of obtaining information as to where each of these documents can be obtained and where they may be obtained.

Getting the necessary birth certificate, for instance, adds to the costs of voting for an individual who lacks one, relative to an individual who already has a driver's license or passport. Although it is possible to avoid the monetary cost of a photo identification by executing an affidavit of indigency, that is not possible with regard to a birth certificate, nor is it possible with respect to the transportation costs involved in each trip and the ability to leave work without losing pay for the trip to get the birth certificate. Further, executing the affidavit of indigency cannot be done at the polling place, so it, too, requires a separate effort, with the attendant transportation costs, to comply.

Which groups might be burdened by these increased costs and therefore at risk of losing their right to vote? People who might find it difficult to pay the costs of time, transportation, fees, and information include those who are disabled, homeless, persons with limited income, those who do not own cars and who do not have driver's licenses but who are registered to vote, people of color and those who a part of "language minorities," and elderly persons (especially those in retirement facilities).

Research on the impact of the "motor voter" law (see Highton and Wolfinger, 1998) also found that the greatest registration increases produced by the legislation were among students and those who had recently moved, indicating the disproportionate effect of the costs of registration on these groups. It is also problematic that college students and young adults

living away from home rarely have their dorm or college address on their driver's license; therefore their license would not be valid for voting purposes and they would have to provide other proof of residence.

A new study (Pawasarat, 2005) helps to document the extent to which such groups could be affected by the new Indiana photo ID law, in finding that approximately 23 percent of Wisconsin residents 65 years and older do not have a Wisconsin driver's license or photo identification (of whom 70 percent are women). Pawasarat also finds that big-city residents, especially those who are African-American and Latino, are markedly less likely to have driver's licenses than are Caucasian non-big-city residents.

These Groups Have Distinctive Viewpoints on Some Political Questions.

There are some differences in political perspectives between these targeted groups and other voters, though they do not necessarily follow conventional wisdom. It is often assumed that because non-voters are drawn disproportionately from among poor and working class people and members of minority groups, therefore most non-voters must be Democrats, so any legislation that reduces the cost of voter turnout would benefit Democratic candidates.

Systematic empirical research does not confirm this view, however. Citrin et al. (2003: 76), in a study of 91 Senate races in 1994, 1996, and 1998, find that

"there is no constant, linear association between turnout and the Democratic vote." Although non-voters are somewhat more likely to identify as Democrats, this tendency varies across states and across time periods. It is perhaps most accurate to say (as DeNardo, 1980 does) that higher voter turnout brings more "peripheral" voters to the polls – those with weaker party identification – so higher turnout tends to lead to higher rates of defection from the majority party in the area. That is as likely to benefit Republicans On areas where they are in the minority) as it is Democrats. So the partisan implications of turnout vary, depending on the state or locality in question. Overall, however, Citrin et al. find that if all non-voters were to come to the polls on Election Day, in the three years' worth of Senate races they studied, only a very small number of races would have had a different outcome.

With regard to preferences on policy issues, research shows that there are some differences worth noting between those less likely to vote, for whom the costs of voting are felt more heavily, and those who go to the polls regularly (see Highton and Wolfinger, 2001: 179; Gant and Lyons, 1993). According to Bennett and Resnick (1990: 791-793), for example, non-voters are more likely to favor increased provision of government services. They are more strongly in favor of government spending on domestic policy and more positive in their attitudes toward government social programs. This is understandable given the tendency of non-voters to be of lower socio-economic

status than voters are, and to be more likely to be of minority racial groups.

In addition to these differences in views on issues, disadvantaged people and those for whom the costs of voting weigh more heavily tend to have different policy *agendas* than advantaged groups do. In particular, they are less concerned with foreign policy and issues such as abortion and the environment and more concerned with health and human services and other basic human needs (Verba, Schlozman, and Brady, 1995, pp. 220-225).

Is There Some Valid Reason to Make Voting Harder for Some Groups Than for Others?

Although voting is a fundamental right in the United States, various states have at times chosen to deny that right to some residents, presumably because the states' lawmakers felt that the dangers to the polity that would be posed by these residents' voting outweighed the value of universal adult suffrage. Most states, for example, deny the right to vote to convicted felons while they are serving their sentences, and many require that these felons petition to recover their suffrage after they have been released from incarceration.

Do the targeted groups with regard to this legislation have any characteristics that could make them a threat to the state of Indiana if they were to vote? Several political scientists have used survey data to determine, for example, whether disadvantaged

groups and those less likely to vote are more anti-democratic in their attitudes than advantaged groups and other voters are. One of the most thorough of these analyses (Bennett and Resnick, 1990) finds no evidence of this. They report only weak relationships with levels of expressed patriotism and levels of alienation. Disadvantaged groups and infrequent voters are no more likely than other citizens to favor substantial change in government officials (p. 782), to oppose civil liberties (pp. 783-785), or to be hostile to business or to favor government ownership of industry or other sectors of the economy (p. 797).

What Is the Impact on the Political System if Some Groups Face Higher Burdens in Casting a Ballot Than Others?

The democratization of American elections has proceeded gradually but inexorably for more than two centuries (see Williamson, 1960). From the elimination of property or tax-paying requirements to the enfranchisement of black men, women, and those 18 to 21 years old, the American political system has been driven by the principle that universal adult suffrage is a democratic value, and that the denial of suffrage ought to be driven by a good reason why the adult in question does not deserve the right to choose his or her elected representatives. There would appear to be no good reason why the groups for whom voting would become more costly as a result of this legislation – elderly and infirm people, poor people, blacks and other racial and language minorities,

college students, the homeless, and those who do not own cars – ought to be singled out for such treatment.

In summary, when we look at the decision to go to the polls as a balance of costs and benefits to the citizen, voting has been found to impose more immediate and tangible costs than benefits, and even small increases in the cost of voting have been found to drive down turnout. Some types of citizens disproportionately bear the costs of voting, and even slight increases in those costs have particular impact on the participation of those citizens. These include people disadvantaged in education, income, mobility, place of residence, age, and race. There would appear to be no support for the notion that people with these characteristics would be more likely than more advantaged people to threaten the preservation of the political system, and so should be disproportionately burdened by voting prerequisites. And in fact, the burdening of these groups would seem to jeopardize the principle of universal adult suffrage and the need for legitimacy in democratic elections.

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Table 1. **Voting Rates by State as a Proportion of Citizen Voting-age Population in 2004 Relative to Type of Voter Registration Requirement**

State	***Turnout***	***Prospective Voters Must Register by***
Minnesota	*79.2*	*Election-day registration*
Wisconsin	*76.6*	*Election-day registration*

Oregon	74.0	21 days before
Maine	*73.1*	*Election-day registration*
New Hampshire	*71.5*	*10 days before or on Election Day*
North Dakota	*71.5*	*No registration required*
Iowa	71.3	10 days before
Montana	70.2	30 days before
D.C.	69.2	30 days before
Massachusetts	68.6	20 days before
Missouri	68.5	28 days before
South Dakota	68.3	15 days before
Utah	67.8	20 days before
Alaska	67.6	30 days before
Washington	67.6	30 days before
Colorado	67.5	29 days before
Vermont	67.3	10 days before
Michigan	67.1	30 days before
Wyoming	*66.9*	*29 days before or on Election Day*
Delaware	66.4	20 days before
Ohio	66.1	30 days before
New Jersey	66.0	29 days before
Illinois	65.6	28 days before
Maryland	65.6	21 days before
Nebraska	65.3	11 days before

Kentucky	65.0	29 days before
Pennsylvania	64.5	30 days before
New Mexico	64.4	28 days before
Florida	64.3	29 days before
Kansas	64.2	15 days before
Louisiana	64.2	30 days before
Arizona	63.8	29 days before
*** U.S. average **	*63.8*	
Rhode Island	63.7	30 days before
Alabama	63.2	11 days before
Connecticut	63.2	14 days before
South Carolina	63.2	30 days before
Virginia	63.1	29 days before
Oklahoma	62.3	25 days before
California	61.9	15 days before
Mississippi	61.7	30 days before
Idaho	*61.6*	*25 days before or on Election Day*
North Carolina	61.4	25 days before
New York	60.2	25 days before
Nevada	58.9	21 days before
Arkansas	58.7	30 days before
Indiana	58.6	30 days before
West Virginia	57.2	20 days before
Texas	57.1	30 days before

Georgia	56.8	30 days before
Tennessee	54.6	30 days before
Hawaii	50.8	30 days before

Sources: For states' voter turnout rates in 2004: U.S. Census Bureau data found on the Internet at http://www.census.gov/population/www/socdemo/voting/cps2004.html Table 4c. Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2004. For registration deadlines: each state's Secretary of State Web page (compiled by the author).

Table 2. **Voter Turnout in Presidential Elections in Western Industrialized Democracies**

Democracy	***Year***	***Vote as a Proportion of Voting-Age Population***
Iceland	1996	87.0
Israel	1999	84.5
Belarus	2001	81.3
Finland	2000	76.8
France	2002	71.7
Austria	1998	68.6%
United States	***2000***	***49.3***
United States	***2004***	***59.6***

Parliamentary (legislative) elections:

Iceland	1999	86.2
Italy	2001	84.9
Israel	1999	84.4
**Belgium	1999	83.2
**Australia	1998	81.7
Sweden	1998	77.7
Germany	2002	75.3
Spain	2000	73.8
Norway	2001	73.1
New Zealand	2002	72.5
Netherlands	1998	70.1
Finland	1999	65.2
France	1997	59.9
Japan	2000	59.0
Canada	2000	54.6
United States	***2002***	***39.0******
Switzerland	1999	34.9*

* National elections in Switzerland are regarded as secondary to cantonal elections, in which turnout is higher.

** These countries have some form of compulsory voting. Austria and Italy have official sanctions against non-voting but they are not enforced or only weakly enforced.

*** The percentage refers to voting for the top office on the ballot in the midterm election (governor, U.S. senator, or U.S. House member); voting for down-ballot offices tends to drop off further (called "roll-off").

Note: Voter turnout can be calculated in different ways, so an individual nation's turnout figure should be compared with the turnout of other nations calculated in the same manner. Comparisons *between* studies need to specify the method used to calculate turnout.

Source: International Institute for Democracy and Electoral Assistance Global Survey of Presidential Elections; on the Internet at http://www.idea.int/vt/pres.cfm (accessed August 23, 2005).

About the Author:

A curriculum vitae is attached listing all of my publications during the past ten years. I have not been paid for taking part in this case by anyone, nor have I been promised any payment. I have never given expert testimony before in any trial or in any court proceeding anywhere.

/s/ Marjorie Hershey

Sept. 15, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs,	)	
v.	)	
TODD ROKITA, et al., Defendants,	)	
WILLIAM CRAWFORD, et al., Plaintiffs,	)	No. 1:05-CV-00634 SEB-VSS
v.	)	
MARION COUNTY ELECTION BOARD, Defendant,	)	
and	)	
STATE OF INDIANA, Intervenor.	)	

APPENDIX OF THE STATE OF INDIANA, THE INDIANA SECRETARY OF STATE, AND THE CO-DIRECTORS OF THE INDIANA ELECTION DIVISION

(Filed Dec. 1, 2005)

* * *

[LOGO] **Building Confidence in U.S. Elections**
REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM
SEPTEMBER 2005

ORGANIZED BY
Center for Democracy and Election Management
American University

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RESEARCH BY
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* * *

2.5 VOTER IDENTIFICATION*

A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed.

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* [Pictures Omitted In Printing]

There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election.[19] The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.

The voter identification requirements introduced by HAVA are modest. HAVA requires only first-time voters who register by mail to show an ID, and they can choose from a number of different types of identification. States are encouraged to allow an expansive list of acceptable IDs, including those without a photograph, such as utility bills or government checks. These requirements were not implemented in a uniform manner and, in some cases, not at all. After HAVA was enacted, efforts grew in the states to strengthen voter identification requirements. While 11 states required voter ID in 2001, 24 states now require voters to present an ID at the polls.[20] In addition, bills to introduce or strengthen voter ID requirements are under consideration in 12 other states.[21]

Our Commission is concerned that the different approaches to identification cards might prove to be a serious impediment to voting. There are two broad alternatives to this decentralized and unequal approach to identification cards. First, we could recommend eliminating any requirements for an ID because the evidence of multiple voting is thin, and ID requirements, as some have

argued, are "a solution in search of a problem." Alternatively, we could recommend a single national voting identification card. We considered but rejected both alternatives.

We rejected the first option – eliminating any requirements – because we believe that citizens should identify themselves as the correct person on the registration list when they vote. While the Commission is divided on the magnitude of voter fraud – with some believing the problem is widespread and others believing that it is a minor – there is no doubt that it occurs. The problem, however, is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system. A good ID system could deter, detect, or eliminate several potential avenues of fraud – such as multiple voting or voting by individuals using the identities of others or those who are deceased – and thus it can enhance confidence. We view the other concerns about IDs – that they could disenfranchise eligible voters, have an adverse effect on minorities, or be used to monitor behavior – as serious and legitimate, and our proposal below aims to address each concern.

We rejected the second option of a national voting identification card because of the expense and our judgment that if these cards were only used for each election, voters would forget or lose them.

We therefore propose an alternative path. Instead of creating a new card, the Commission recommends that states use "REAL ID" cards for voting purposes. The REAL ID Act, signed into law in May 2005, requires states to verify each individual's full legal name, date of birth, address, Social Security number, and U.S. citizenship before the individual is issued a driver's license or personal ID card. The REAL ID is a logical vehicle because the National Voter Registration Act established a connection between obtaining a driver's license and registering to vote. The REAL ID card adds two critical elements for voting – proof of citizenship and verification by using the full Social Security number.

The REAL ID Act does not require that the card indicates citizenship, but that would need to be done if the card is to be used for voting purposes. In addition, state bureaus of motor vehicles should automatically send the information to the state's bureau of elections. (With the National Voter Registration Act, state bureaus of motor vehicles ask drivers if they want to register to vote and send the information only if the answer is affirmative.)

Reliance on REAL ID, however, is not enough. Voters who do not drive,[22] including older citizens, should have the opportunity to register to vote and receive a voter ID. Where they will need identification for voting, IDs should be easily available and issued free of charge. States would make their own decision whether to use REAL ID for voting purposes or instead to rely on a template form of voter ID. Each state would

also decide whether to require voters to present an ID at the polls, but our Commission recommends that states use the REAL ID and/or an EAC template for voting, which would be a REAL ID card without reference to a driver's license.

For the next two federal elections, until January 1, 2010, in states that require voters to present ID at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified. After the REAL ID is phased in, i.e., after January 1, 2010, voters without a valid photo ID, meaning a REAL ID or an EAC-template ID, could cast a provisional ballot, but they would have to return personally to the appropriate election office within 48 hours with a valid photo ID for their vote to be counted.

To verify the identity of voters who cast absentee ballots, the voter's signature on the absentee ballot can be matched with a digitized version of the signature that the election administrator maintains. While such signature matches are usually done, they should be done consistently in all cases, so that election officials can verify the identity of every new registrant who casts an absentee ballot.

The introduction of voter ID requirements has raised concerns that they may present a barrier to voting, particularly by traditionally marginalized groups, such as the poor and minorities, some of whom lack a government-issued photo ID. They may also create obstacles

for highly mobile groups of citizens. Part of these concerns are addressed by assuring that government-issued photo identification is available without expense to any citizen and, second, by government efforts to ensure that all voters are provided convenient opportunities to obtain a REAL ID or EAC-template ID card. As explained in Section 4.1, the Commission recommends that states play an affirmative role in reaching out with mobile offices to individuals who do not have a driver's license or other government-issued photo ID to help them register to vote and obtain an ID card.

There are also longstanding concerns voiced by some Americans that national identification cards might be a step toward a police state. On that note, it is worth recalling that most advanced democracies have fraud-proof voting or national ID cards, and their democracies remain strong. Still, these concerns about the privacy and security of the card require additional steps to protect against potential abuse. We propose two approaches. First, new institutional and procedural safeguards should be established to assure people that their privacy, security, and identity will not be compromised by ID cards. The cards should not become instruments for monitoring behavior. Second, certain groups may see the ID cards as an obstacle to voting, so the government needs to take additional measures to register voters and provide ID cards.

The needed measures would consist of legal protections, strict procedures for managing

voter data, and creation of ombudsman institutions. The legal protections would prohibit any commercial use of voter data and impose penalties for abuse. The data-management procedures would include background checks on all officials with access to voter data and requirements to notify individuals who are removed from the voter registration list. The establishment of ombudsman institutions at the state level would assist individuals to redress any cases of abuse. The ombudsman would be charged with assisting voters to overcome bureaucratic mistakes and hurdles and respond to citizen complaints about the misuse of data.

The Commission's recommended approach to voter ID may need to adapt to changes in national policy in the future. Since the attacks of September 11, 2001, concerns about homeland security have led to new policies on personal identification. Under a presidential directive, about 40 million Americans who work for or contract with the federal government are being issued ID cards with biometrics, and the REAL ID card may very well become the principal identification card in the country. Driven by security concerns, our country may already be headed toward a national identity card. In the event that a national identity card is introduced, our Commission recommends that it be used for voting purposes as well.

Recommendations on Voter Identification

2.5.1 To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), a photograph, and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to non-drivers free of charge.,

2.5.2 The right to vote is a vital component of U.S. citizenship, and all states should use their best efforts to obtain proof of citizenship before registering voters.

2.5.3 We recommend that until January 1, 2010, states allow voters without a valid photo ID card (Real or EAC template ID) to vote, using a provisional ballot by signing an affidavit under penalty of perjury. The signature would then be matched with the digital image of the voter signature in the voter registration database and if the match is positive, the provisional ballot should be counted. Such a signature match would in effect be the same procedure used to verify the identity of voters who cast absentee ballots. After January 1, 2010, voters who do not have their valid photo ID could vote, but their ballot would only count if they returned to the appropriate election office within 48 hours with a valid photo ID.

2.5.4 To address concerns about the abuse of ID cards, or the fear that it could be an obstacle to voting, states should establish legal protections to prohibit any commercial use of voter data and ombudsman institutions to respond expeditiously to any citizen complaints about the misuses of data or about mistaken purges of registration lists based on interstate matching or statewide updating.

2.5.5 In the event that Congress mandates a national identification card, it should include information related to voting and be connected to voter registration.

Bogus names jam Indiana's voter list

Invalid, repeat entries damaging credibility.

By Bill Theobald

Indianapolis Star

November 5, 2000

The first general election of the millennium is just two days away, and Indiana's voter rolls are bursting with 4 million names – a record.

But hundreds of thousands of those names, as many as one in five statewide and more in some counties, are bogus. The people behind those names have moved, died or gone to prison.

Tens of thousands are registered in more than one county in Indiana. And sloppy record-keeping makes it appear people have voted twice in the same election, at old addresses and in one case even after death.

The clogged voter registration records mean the heart of our election system, the soul of our democracy, is ailing.

Inaccurate voter lists mean a lot more than that, too – they create the possibility of voter fraud and cost taxpayers thousands of dollars. And poor voter participation looks even worse than it is because of inflated registration figures.

And for all that, the thousands of valid names added to the rolls mean little because the number of people showing up at the polls has barely budged.

Details of the bloated condition of the state's voter lists were uncovered in an examination by *The Indianapolis Star.*

Hoosier officials use terms like "ridiculous," "unbelievable" and "a nightmare" to describe that condition.

There's enough concern that legislation will be offered next year to make it a bit easier to clean up the rolls and to form a committee to study the ultimate solution – a statewide computerized voter database.

This is not just a problem in Indiana. One national expert on voter registration says lists in many states are so inaccurate that the numbers are "virtually unusable."

Invalid names piling up on the state's voter registration rolls primarily are the result of the National Voter Registration Act, commonly called "motor voter" because it allows people to register to vote when they get their driver's licenses, and by mail.

The law was implemented in Indiana five years ago and has made it far easier to register to vote but far more difficult to rid the rolls of invalid names.

"It has become almost ridiculous. I don't know (if) there is fraud, but it invites the possibility of fraud," said state Rep. Mark Kruzan, D-Bloomington, Majority Floor Leader in the Indiana House, who tried unsuccessfully last year to pass legislation to help unravel the lists.

A lot of the problem could have been prevented had Indiana created a statewide computerized database of its voter rolls when the motor voter law went into effect.

But fear blocked the way – fear by Republicans that they would lose the political advantage they had held so firmly in this state and fear of uncertain technology and a loss of local control by county officials.

Now, the same solutions that were discussed when the law took effect are emerging again, though it may take some time to see them through.

Legislative leaders are focused on issues in the coming session that will bring them bigger political payoffs – dividing up the state budget and redrawing political boundaries.

Meanwhile, the voter lists keep growing. Large toll for inaccurate rolls

The lists that show who is registered to vote Tuesday are a quagmire of out-of-date information.

Interviews and a computer-assisted analysis by *The Star* found:

Tens of thousands of people appear on the voter rolls more than once. Thousands of these double registrations exist in central Indiana.

More than 300 dead people on the rolls were discovered, and the real number is probably higher. One of those registered, a South Bend woman, died in April 1998 but was recorded as voting in that fall's general

election. Election officials believe it was a clerical error.

The public has been misled about voter participation. Measured as a percentage of the voting age population, turnout was essentially the same in the 1998 general election as it was in 1994, just before the new law went into effect. But because the voter rolls have swelled so dramatically with incorrect information, it has appeared that voter turnout dropped 10 percentage points during that time.

State and county officials spend hundreds of thousands of dollars dealing with the bulging rolls. County officials have added polling sites, bought voting machines and spent staff time and money wrestling with the lists.

An analysis of the nine-county central Indiana area revealed more than 500 examples that appear to show someone voting in a county where they no longer live. One person admitted to voting in Marion County after having moved to Hamilton County, but said poll workers said it was OK. In the other cases where *The Star* could track down voters, the people had moved from one county to the other and then moved back – without their names being removed from the rolls.

Inaccurate voter records make it appear that four people in central Indiana voted twice in the same election. No one noticed the apparently improper votes because no one in Indiana looks for fraud in a systematic way.

A cursory check found three convicted killers and two convicted child molesters on the voter rolls in central Indiana – even though state law says the names of anyone convicted and sentenced to even one day in jail are supposed to be removed. People may register again when they are released.

Officials don't think widespread, systematic voter fraud is going on in the state. And *The Star* analysis didn't find any.

"The bottom line here is I think we are lucky to live in a state where most people are pretty scrupulous," said Bruce Northern, the state coordinator for implementing the federal registration law. "It's a Midwest thing."

Still, many concede, the potential is there and fervor by misguided citizens easily could turn that potential into a problem.

"When you consider how low the turnout is and how narrow the margins are becoming in more and more races, it only takes a couple of votes to steal an election," said Deborah M. Phillips, president of the Voting Integrity Project, a national group pushing concerns about the motor voter law.

Not just a Hoosier problem

Many states besides Indiana have struggled to keep the voter rolls clean.

That's because the names just keep rolling in. According to a report from the Federal Election Commission,

between 1994 and 1998, nearly 26 million names were added to the voter rolls nationwide – about a 20 percent increase.

Alaska, according to the same report, had 502,968 names on its voter rolls in 1998. That's a mean trick considering the census estimates only 437,000 people of voting age were living in the state that year.

Curtis B. Gans, director of the Committee for the Study of the American Electorate, stated in a report on the 1998 general election that the voter registration numbers from around the country "are virtually unusable" and "more inaccurate than they have ever been."

Several voting fraud scandals have been blamed on the new law.

In California, U.S. Rep. Robert K. Dornan, a Republican, tried unsuccessfully to get his loss in the 1996 election overturned, claiming voter fraud.

The 1997 Miami mayor's race was overturned after investigators discovered widespread absentee ballot fraud.

The motor voter law also has received some attention when people in other states have used the mail-in forms to register fictitious people – or pets – and then obtain absentee ballots in those names. The same loophole, exists in Indiana; other states have tried to close it by requiring people who register by mail to vote in person the first time.

While the law may have had the unintended consequences of making voter lists dirty and spawning fraud, two expected results have not materialized.

According to officials of both parties and academic studies, the law has not boosted the numbers of Democratic voters, as Republicans feared. Nor has it increased voter turnout, as some predicted.

In Indiana, 727,723 more names were on the voter rolls in 1998 than in 1994, but turnout dropped to 37percent of the voting age population, compared to 38 percent in 1994. Nationwide, despite the 26million additional names on the rolls, turnout dropped from a pathetic 39percent of those of voting age in 1994 to an awful 36 percent in 1998.

Despite its problems, the law's noble intent – to open up the voter registration process – is applauded, even by those who were critics at the time or are worried about the side effect of dirty voter lists.

Gans, for example, calls motor voter a "wonderful law."

"It makes registration virtually automatic in this country, and that's a good thing," he said.

Whatever their view, everyone agrees that changes in the motor voter law aren't expected anytime soon.

Said William C. Kimberling, of the Federal Election Commission, "Right now, it's just kind of a dead issue."

Lots of deadwood

In Indiana, one word describes the problem with the motor voter law five years out: deadwood.

Since 1994, more than I million names have been added to Indiana's voter registration lists. That's up one-third in just half a decade.

Estimates from election officials on how many of those names are invalid range from 10 to 20 percent or even higher. Marion County voter registration board members Sherry Beck, a Republican, and Cathline Mullin, a Democrat, estimate up to 35 percent of the names in their county are no good.

The Indiana Election Division's "duplicate voter registration elimination project" this year identified more than 97,000 people in Indiana registered at more than one address.

Using the same methodology as the state, *The Star* looked more closely at the nine-county central Indiana region and found almost 19,000 people registered twice, about one-fifth of the state total.

Another source of deadwood is dead people.

By comparing a statewide list of Indiana voters compiled by the Election Division to a database of people who have died, obtained from the U.S. Social Security Administration, *The Star* identified more than 300 dead people statewide who remain on the registration lists. The number of dead people on the rolls is probably even higher because the Social

Security agency said its database is not comprehensive.

More than half of those dead people identified in the comparison are registered in Lake County, a northwest Indiana industrial area with a reputation for political hi-jinks. None of those names, however, could be shown as having voted posthumously.

Sally La Sota, director of the Board of Elections and registration in Lake County, had no explanation for the large number of dead people still registered in her county.

The name of Ruth Brown of South Bend presents the most worrisome reminder of what can go wrong if voter rolls aren't kept up to date.

Brown was a longtime elementary teacher who was named Teacher of the Year in the South Bend school district in 1980, the year she retired.

She died at an Elkhart care facility on April 15, 1998, at age 83.

But her official voting record in the St. Joseph County clerk's office shows her casting an absentee ballot in the November 1998 election.

St. Joseph County Clerk Linda Scopelitis said the absentee ballot applications and the envelopes in which absentee ballots are placed were thrown away accidentally in that precinct. But John Court, the Democratic member of the county Voter Registration Board, said he discovered a list of people who voted

absentee in that precinct. Brown's address appears, but the name has been typed over.

Brown's name was marked as voting absentee by precinct workers in the poll book, but so was the name of another person listed just below Brown and registered at the same address. Court thinks the poll workers incorrectly marked the other person's vote for Brown.

Indiana's voter rolls also include names of convicted criminals.

One is Collis Sivels, 27, of Indianapolis, who was sentenced to serve 60 years in prison in July 1999. He was convicted of murder in the September 1996 shooting death of a man at a Westside apartment complex.

Voters caught unaware

The Star's analysis and interviews also indicate people may be voting at old residences after they have moved to another county.

Just in the nine central Indiana counties, *The Star* found more than 500 cases where it appeared that someone had moved from one county to another and yet voted in the previous county of residence.

Of those examples where *The Star* was able to track down the voters, most people said they voted in the correct county.

Bradley E. Garloch of Fishers admits he voted at his old address in Marion County in the 1999 general

election but said he tried to vote in the right place and was told he couldn't.

Garloch, 30, lived at a Northeastside apartment complex for several years and voted there.

He moved to a house in Fishers late in the summer of 1999 and registered to vote. Close to Election Day, Garloch said he talked to an election official – he doesn't recall whom – and was told he couldn't vote in Hamilton County. He then went to his old precinct in Indianapolis and said poll workers told him because his name still appeared on his old apartment lease that he could vote.

But the law says clearly that people should vote where they live. For Garloch, that meant Hamilton County.

Based on inquiries they receive, election officials also suspect people are voting at old addresses.

John Williams, election deputy for Shelby County, said he has received calls from former Shelby County residents who say they want to come back to vote.

"I warn them," Williams said, but because they won't give their names, there is no way to check whether they did vote illegally.

Far more disturbing than people voting in the wrong place would be people voting twice in the same election.

Just comparing voter rolls in the nine-county area, *The Star* found four examples of people who, according to

official county records, voted twice in the same election.

But in each case, when county election officials at *The Star's* request went back to the poll books – which people have to sign when they vote – they discovered that votes in that person's name had been recorded incorrectly.

That's what happened to Jackson C. Mahaney of rural Boone County.

The 40-year-old travel-magazine editor is a native of Zionsville and has moved back and forth between Boone and Marion counties.

He ended up registered in both places, and the official records showed him voting in both counties in the 1996 general election.

Mahaney was living in Marion County then, he said, and didn't vote in Boone.

"I know I didn't do that because I was lucky to get in to vote once," he said, referring to his busy schedule.

Fortunately, Boone County officials saved the poll books from that election – even though they legally could have thrown them out two years ago.

Mahaney's name doesn't even appear in those records, according to the clerk there. The culprit: clerical error.

Donald A. Decker was at first a little glib when told he was registered in two counties – Marion and Hancock.

"I don't want Clinton to win, so I gotta do what I can," he said, laughing.

But when he discovered that the official voting records showed him casting a ballot in both counties in the 1998 general election, Decker grew concerned – and was adamant that it didn't happen.

The 59-year-old engineer said he lived with his stepson in Indianapolis when he moved here in 1997. He and his wife moved to New Palestine in June 1998.

Marion County election officials solved the mystery when they discovered that in the poll book someone had written "moved last year" in the signature area next to Decker's name.

That was counted as a vote.

Costly to taxpayers

The clogged rolls have cost taxpayers thousands of dollars in cleanup costs and additional election expenses.

The Indiana Election Division has conducted its statewide duplicate program four times at a total cost of about $900,000.

And several county officials, such as Monroe County Clerk Pat Haley, believe they have increased the

number of voting sites unnecessarily because the lists are so out of whack.

Haley, whose county includes the transient student population of Indiana University at Bloomington, has added about a half dozen precincts since the law went into effect. Each new precinct costs county taxpayers $10,000 for two voting machines and about $500 per election for additional poll workers and supplies.

Statewide, more than 200 precincts have been added since the motor voter law went into effect, according to state election officials.

More precincts – and more cost – could be in the offing.

Kathy Richardson, a state representative who also is the Hamilton County Election Administrator, said she has 13 precincts that already are over the 1,200-registered-voter limit that forces splitting off a new precinct. Marion County officials also report 13 precincts with more than the legal limit and a total of 39 with more than 1,000 voters.

Money also is wasted in Indiana because thousands of people fill out new registration forms even though they are already validly registered at their current address.

In fact, according to a Federal Election Commission report, 121,783 wasted forms were filled out in Indiana in 1997-98, giving the state the highest percentage of unnecessary registrations of any state in the country.

Some election officials even worry that making registration so easy has eroded the importance of the voting process.

"I think we've tossed away that responsibility for numbers that don't mean anything," Haley said.

Mobility causes unreliability

People move around a lot these days.

That is the key reason why it's so difficult to keep voter rolls up-to-date.

According to a U.S. Census report released this summer, 43 million people, or 16 percent of the population, moved from March 1998 to March 1999.

Under the old system, before the motor voter law, people who moved or died or were sent to prison were removed at the request of a party precinct official. That also occurred when they didn't show up to vote for several years.

But now there exists a complex system requiring precise communication and follow-through by state and local officials and individual voters before a name can be purged from the rolls.

Precise communication and follow-through don't always happen, however.

A case in point is the main cleanup program the state runs to find people registered in more than one place.

Here is how it worked – or didn't – this year:

Step 1: The Indiana Election Division hired a contractor to obtain a computer copy of the voter registration lists from each of Indiana's 92 counties.

Problem 1: The data provided by the counties was incomplete and inconsistent Counties use different computer systems, and some county lists lacked dates of birth for some voters, or the address information was incomplete.

Step 2: The contractor compiled the county lists into one master list and looked for exact matches using the first name, last name and date of birth.

Problem 2: No birth dates in some records meant no way to match names. Plus some people don't register in the exact same name each time, and others change their names when they marry.

Step 3: Those who were matched were sent post-cards. More than 200,000 were sent this summer. People were supposed to mark their old address and return the card. The counties then were sent the names of those people to be removed.

Problem 3: Just under one-third of the cards came back from the post office because the address was wrong or the forwarding address had expired. Many people either missed or blew off those that did make it to the right mailbox. Only about a fourth of the people returned their cards this year.

A final twist: Those who didn't return the post-cards have their registration placed on "inactive" status, but it takes at least two more years before they can be removed from the voter lists.

In fact, these people could vote Tuesday at their old address or in both places.

The kicker: If someone does vote at an old address, his or her registration status reverts to active and the name won't be removed from the rolls.

Candy Marendt, the Republican co-director of the Indiana Election Division, and Spencer Valentine, the Democratic co-director, sympathize with county officials but acknowledge frustration with getting the information they need – accurately and on time – to run the state cleanup program.

"It's like herding cats," Valentine said.

Cleanup programs ignored

Two statewide cleanup programs allowed under Indiana law have never been used by the Election Division.

One, checking the state list against the Social Security Administration death list, which *The Star* did, has been considered but never implemented.

The other, a provision in state law that allows the Election Division to mail a notice to every registered voter in the state and then use the responses as a basis for cleaning up the lists, has been rejected because of cost.

It is estimated such a mailing would have a price tag of about $2million – about twice the Election Division's entire annual budget.

One reason dead people have not been removed from the rolls is that the Indiana State Department of Health has been behind in its state-mandated requirement to notify county officials of people who have died in another Indiana county or elsewhere in the country.

Barbara Stultz, state registrar and director of vital statistics for the Health Department, said the state was two to four years behind in its reports to the county election offices when she took over the job in 1994. The office is now about two quarters behind and hopes to be caught up soon, she said.

Several county election officials also said they don't regularly receive lists of convicted criminals sentenced to jail from their county sheriffs' offices.

Beck and Mullin, the two in charge of Marion County's voter registration rolls, said Marion County Sheriff Jack Cottey never has filed the required report of convicted prisoners with their office.

A Sheriffs Department spokesman said the office didn't know about the requirement until notified by *The Star* and hadn't been called by election officials whose office is just across the street from the sheriffs. The sheriff now will begin producing the convicted-prisoner reports, he said.

The voter lists are dirty, too, because county election officials are banned under law from doing any comprehensive cleanup at the county level. Several counties, including the two largest, Marion and Lake, have explored doing countywide mailings to weed out invalid names, but state officials say the law requires any such mailing must be done statewide.

Still, county officials do what they can, and some even skirt the law a bit. Removing a dead voter is supposed to require an official document.

Linda Grass, Hancock County Clerk and co-chairwoman of the state clerks association's legislative committee, said if she or someone she knows well has gone to the funeral home and seen the body:

"We'll take that."

Same solutions, obstacles

Eventually, the same politics that helped get the state into this mess may lead it out.

The solution that's beginning to win acceptance is a statewide computerized database combined with a unique identifying number for each voter – possibly the last four digits of a person's Social Security number.

The statewide computer system is the same idea some Republican leaders opposed because they believed the lists the state GOP uses for campaigning were better than those of their Democrat rivals.

Having a more accurate state-generated list would have surrendered that advantage.

But Democrats have caught up to the Republicans, financially and technologically, and that's one reason officials from both parties stood side by side at a legislative study committee this summer and argued for the system.

County election officials are now more willing to study the idea. But many still have reservations – particularly about state officials messing with their voter registration records.

Those worries prompted the study committee, chaired by Rep. Thomas Kromkowski, D-South Bend, chairman of the House Elections and Apportionment Committee, to pull back from recommending legislation for next year's session to create a statewide computer database of the people registered to vote in Indiana. Instead, Kromkowski will propose that the state form a special summer study committee in 2001 to look at the issue in depth.

His committee did recommend a bill to require people to provide the last four digits of their Social Security numbers when they register to vote. On its own, that would take a while to have much impact.

County officials are content to wait on the statewide computer system.

Said Richardson, the Hamilton County election official who served on the interim legislative committee: "I'd rather delay it for another year than mess it up."

And the coming legislative session is already crowded with issues leaders consider more important. "I think it's a second-tier priority," said Sen. Robert Garton, R-Columbus, President Pro Tempore of the Senate. The first tier, he said, includes redistricting – a purely political battle over which party can win advantage in the drawing of new election boundaries. Lawmakers also will focus on taxes, education, and the state budget, Garton said.

House Speaker John Gregg, D-Sandborn, was dismissive. "You guys are really scraping for a story," he said. "This is about the most boring topic."

Democratic Gov. Frank O'Bannon expected to win a second term Tuesday, didn't have time to respond to questions about the issue, his spokesman said.

Gans, the national voter registration expert, said there is one thing that will push inaccurate voter rolls to the top of the political agenda: a crisis.

And make no mistake, he said, one is possible.

"It is a potential accident waiting to happen."

Contact Bill Theobald at (317) 444-6602 or via e-mail at bill.theobald@starnews.com

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Indiana Voter Identification Requirement: The Impact of List Inflation

Report of Clark H. Bensen[1]
Prepared for litigation
October 2005

Inquiry: I was asked by counsel in this case whether the new requirement for a photographic identification before voting in person would mitigate the potential for in-person polling place fraud in Indiana.

The past decade has seen a burgeoning of the voter registration lists across the nation. In large part this is due to the enactment of the National Voter Registration Act, or the NVRA (also called Motor-Voter), first effective with the 1994 elections. While the

[1] Clark H. Bensen, B.A., J.D., is a consulting data analyst and attorney doing business as Polidata ® Political Data Analysis and a publisher of reference volumes operating as Polidata ® Demographic and Political Guides. Polidata is a demographic and political research firm located outside of Washington, D.C.

laudatory goals of this act, i.e., making it easier to register to vote, have been largely met, there are operational concerns that affect the scarce use of election administration resources. One important result of Motor-Voter has been that it is more difficult to purge the rolls for persons who are no longer voting in the jurisdiction.

In effect, a jurisdiction can not even begin the now long process of determining the continued eligibility of a registered voter until several preliminary steps are taken. First, the voter must have failed to vote in two successive federal elections. Second, the election officials must send a notification to the voter that the registration may be cancelled. Third, the officials must wait for the returns. Fourth, they must administratively process the results from the mailing. Importantly, these administrative steps are undertaken by officials at their discretion. The end result of this is that the voter registration lists contain many names of persons who are no longer eligible to vote in that jurisdiction for a variety of reasons, mostly because they have moved or died.[2]

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[2] Again, a voter must refrain from voting in two succeeding federal elections in order for the removal process to begin. The Secretary of State in Vermont succinctly summarizes the problem: The number of registered voters is "inflated due to statutorily mandated delay in removing names of persons who have moved to another voting district, but who have not notified the clerk [the local election authority in Vermont] in writing of this change. (National Voting Rights Act [sic] of 1993)." PRIMARY

(Continued on following page)

The concern is that this increase in these 'extra' registrations, i.e., the persons on the list who may no longer be eligible to vote, means that the potential for in-person voter fraud is made greater because there are more names from which to choose.[3] Election officials have two basic ways to minimize this type of in-person polling place fraud. First, they could have a voter list without any extra names. Second, they could require some form of identification at the polls so that the impact of the extra names is negated. From my perspective, the first is an illusory goal in all but jurisdictions with a very small number of voters so the second is the only operational option for election officials. They can either require a signature comparison or a form of identification at the polls. A photographic identification seems to provide the easiest and most reliable means by which Election Day workers can successfully validate a person's identity, especially when offered a relatively contemporaneous picture instead of a signature that may be many years old.

Indiana has chosen the latter operational option as a way to minimize the degree to which any extra names could be potentially used for in-person polling place fraud. Citizens already registered to vote have three

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AND GENERAL ELECTIONS, VERMONT, 2004, Montpelier: Secretary of State, 2005; at 1.

[3] Moreover, as many of the extra names are likely from persons who have left the jurisdiction, the odds of them actually voting, and thus uncovering the fraud, are even less.

options available to them for voting: 1) showing valid identification at the polling place; 2) voting a provisional ballot; or 3) voting absentee, an option exercised by 10% of Indiana voters in the 2004 general elections.

Requiring a photographic identification at the polls not only addresses some administrative concerns, it also reassures the electorate and instills confidence in the integrity of the overall election process by reinforcing the view that there will be less opportunity for fraud at the polls.

Voters need to know that their vote will be counted and not negated by the counting of ballots by fraudulent voters. As U. S. Attorney General Alberto R. Gonzales recently stated: "The power to vote is one of the greatest opportunities we share as Americans". It is important to "preserve the value of that vote from those who would corrupt the election process."[4]

The key question presented here is, how much opportunity is there for this kind of in-person polling place fraud in Indiana? To answer this question we need to review the voter list and the degree to which there are 'extra' names that could provide an opportunity for this type of voter fraud.

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[4] From Press Release "*Department of Justice to Hold Ballot Access and Voting Integrity Symposium: Conference to Focus on Election Fraud, Voting Rights*", August 2, 2005 (#404). www.usdoj.gov.

State Registration Reports: The voter registration lists include names of some persons who are no longer eligible to vote for a variety of reasons: 1) they have moved to, and/or registered in, a new precinct or county or state; 2) they have died; or 3) they have become ineligible for another reason, e.g., become convicted of a felony. To determine the extent to which there are extra names that provide 'list inflation' we need to review some other data. We begin with the official figures as reported by state election authorities.

For the November 2004 general election, the state reported 4,296,602 registered voters in the state of Indiana with 2,512,142 persons actually voting. This represents a turnout rate of 58.5% of the registered voters. Of these 2,512,142, the state reports that 260,550 voted absentee, which is an absentee turnout rate of 10.4% of the overall voter turnout.

For the 2000 general election, the election closest to the April 1, 2000 Census Day, the state reported that there were 4,000,809 registered voters.[5] The census reported that as of April 1, 2000 there were 4,506,089 persons of voting age (18 and over). Thus the percentage of the voting age persons that were registered was 88.8%. By comparison, the average registration

[5] Note that increase in registration from 2000 to 2004 is 295,793, or a 7.4% increase over the four year period in a state that has grown much slower than the national average; slow enough to have lost a seat in the U.S. House in the 2000 apportionment.

rate for Indiana for the 1988 and 1992 election cycles was 72.6% of the voting age population.[6] This relatively high rate of registration raises the question of whether the rate reflects list inflation.

Let us review the situation with respect to some of these registration and turnout factors before the voter retention aspects of the NVRA. I have compiled a database of county-level registration and turnout indicators for the 8 election cycles held from the years 1990 through 2004. This includes two cycles before implementation of the NVRA, 1990 and 1992. This also includes four Presidential on-year and four off-year cycles. Note however, that Indiana has a split ballot in which three statewide officers are elected in the so-called off-years. This tends to dampen the large swing of voter turnout rates experienced in most states.

There are two factors to review initially: the registration rate and the turnout rate, both measured as percentages of the estimated voting age population.[7] These are designated as Registration As a Percentage

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[6] See Voter Registration and Turnout: 1948-1994, Royce Crocker, Washington, DC: Congressional Research Service, 1996. This study compiled these numbers from every state for several decades of information previously unavailable elsewhere.

[7] The Bureau of the Census provides Voting Age Population (VAP) as part of each decennial census. Estimates between each census are more inconsistently released. Estimates here are merely straight-line interpolations between the two census figures and extended out in like-fashion for 2002 and 2004.

of Voting Age (RAPV) and Voter Turnout As a Percentage of the Voting Age (TAPV) in the attached tables and charts. These measure different subsets but are consistently calculated on the basis of the same universe as a denominator, i.e., the Voting Age Population (VAP). While turnout is sometimes measured as a percentage of the Registration (TAPR), we need to use the rates measured on a more consistent basis, i.e., that of the Voting Age, so that we can compare both rates over time.

From the table for the 1990 election, one can see that the rate of registration for all counties was 69.6% of Voting Age while the rate of turnout was an average of 44.2% of Voting Age. The following table includes the rates for the other years.

Table 1. Average Rates of Counties by Year[8]

Year	RAPV	TAPV
1990	69.6	44.2
1992	78.2	59.1
1994	73.7	44.0
1996	84.4	54.9
1998	90.0	43.1
2000	91.3	52.1
2002	90.7	38.6
2004	94.4	56.0

[8] The RAPV is Registration As a Percentage of Voting Age and the TAPV is Voter Turnout As a Percentage of Voting Age.

By averaging the averages from the two cycles of 1990 and 1992, an on-year and an off-year before the implementation of NVRA, the result is an average 73.9% registration rate and an average turnout rate of 51.7%. The corresponding values for the two most recent on-year and off-year elections, 2002 and 2004, result in a registration rate of 92.6% and a turnout rate of 47.3%. While the overall average turnout rate by county has slightly decreased over the past decade by about 10%, the overall rate of registration has dramatically increased by 25%.

What this means is that the degree of list inflation has also increased dramatically. By way of illustration, I have included tables and charts for a few selected counties. For example, Brown County, a county with a small population located just a bit south of Marion County, reported a total registration for 2004 of 13,661. The estimated number of persons of voting age was 11,656 so the registration rate was an impossible 117.2%. The charts for Brown County tell the story over time. As the population rose modestly over the past decade, from 14,161 to 15,549, so did the estimate of voting age persons, from 10,621 to 11,656. Yet, the registration rose steadily from 7,481 to 13,661, an 83% increase. Therefore the gap between the perceived registration rates based upon voting age (RAPV) and the perceived turnout rate based upon registration (TAPR) ran in opposite directions: RAPV increased and TAPR decreased.

Charts 4 and 5 illustrate the problem. As the registration rate (based upon voting age) grew, the corresponding turnout rate (also based upon voting age) decreased and the gap widened. Chart 5 illustrates that the gap between these two rates was 24.6 in 1990 and 20.9 in 1992. The corresponding rates for 2002 and 2004 were 61.3 and 50.0, respectively. Thus, 50% of the voter registration roll in Brown County as of the 2004 general election consisted of names of voters who did not vote in 2004. Some of this is clearly the result of the give and take of voters who go in and out of the electoral process. However, it is fairly clear that many of these voters are on the list due to the non-maintenance of the lists or the inability to purge names due to NVRA. This conclusion can be supported from other perspectives.

Analytical Options: There are several ways to review the voter list to determine how much list inflation has affected the voter list. First, estimates can be made comparing the registration base with self-reported voting behavior. Second, estimates can be made comparing the registration base with the estimated voting age populations for the state and county levels of geography over time. Third, the names of deceased voters, obtainable from a federal list, can be matched against the voter list. Fourth, one can try and match up names of voters in one county with the lists from other counties. Fifth, the same can be done for lists from other states. We will look at each of these in turn but I will summarize each below.

1) Comparison of the voter registration with self-reported voting behavior. One perspective for review of the voter registration base, is to use the self-reported voting behavior as a means to estimate the true character of the voter list. These data are available from the federal Census Bureau biennially.

2) Comparison of the voter registration with the voting age population. The U.S. Bureau of the Census provides voting age population (VAP), at varying levels of geography, as part of the reports from the decennial census. Alas, the availability of estimates between censuses is a bit inconsistent. A related concern here is the degree to which the overall VAP also includes persons who may be of voting age but who are ineligible to vote (notably non-citizens and felons). This may require an additional level of analysis.[9]

3) Deceased voters on the list. The Social Security Administration produces a Death Master File (DMF). This is a file which is continuously updated and made available to interested parties for the

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[9] In reality, the two largest factors, non-citizenship and felon status, are not likely to affect the status in Indiana to a great degree. Indiana's rates for both of these factors are much lower than the nation. Based upon the 2000 census, Indiana's rate of non-citizenship was 1.9% versus 6.6% for the nation. Based upon data from the Bureau of Justice Statistics, the rate of incarceration was 321 versus 460 per 100,000 persons. Combined this is approximately 2.2% of the voting age that is likely to be ineligible. For our purposes these ineligibles can be ignored here.

maintenance of all types of name and address lists. The state used the DMF as part of the Quest project ("2004 Duplicate Voter Registration Elimination Project and Death Master File List" undertaken by their contractor, Quest Information Systems (hereinafter Quest), following the 2002 election.

4) Duplicate voters, county to county. The state of Indiana has also undertaken just such a review following the 2002 elections as part of the Quest Project.

5) Duplicate voters, other states. While it is theoretically possible to undertake such a review, it does require a source of lists for all states. Until such time as the Help America Vote Act (HAVA) lists for all states are available, this is a bit more difficult. No such review has been undertaken for this project.

Analytical Review:

1) Comparison of the voter registration with self-reported voting behavior. The U.S. Bureau of the Census provides some useful information in this regard. The Bureau undertakes a biennial review of the voting and registration behavior in each state as an add-on to its Current Population Survey (CPS) in the month of each federal election for Congress and, therefore, for President. This information is survey data which is based upon field interviews and does suffer from some self-respondent bias. That is, people are sometimes more likely to recall their 'best behavior' and indicate that they were registered, or

did vote, when, in fact, they did not. This bias could be for a number of reasons aside from the self-response aspect. It could also be the result of sampling error, i.e., that those in the survey sample were not a good representation of the entire universe. Nevertheless, the CPS Voting and Registration Survey (VRS), does provide a different perspective on the information provided by the state as part of the official record. Additionally, it allows for some cross-state comparison based upon a relatively standardized environment.

The VRS of the 2004 CPS for the 2004 presidential election reported the following rates for the state of Indiana: 66.8% of VAP reported being registered and 57.3% of VAP reported voting. This compares to the national rates of 65.9% reported being registered and 58.3% reported voting. Thus, Indiana seems to be close to the nation in both rates of registration and voting on this basis.

Based upon the CPS numbers, a 66.8% self-reported registration rate results in 3,031,000 registered voters; a 57.3% self-reported voting rate results in 2,598,000 voters at the polls. Yet, the official numbers are 4,296,602 registered voters and 2,512,142 voters casting ballots. This means the CPS reports far fewer registrants but about the same number of voters. This comparison suggests that the CPS numbers are more likely to reflect reality inasmuch as the estimate for voting is close to the number of ballots counted whereas the estimate for registration is far fewer than the officially reported number taken from

the voter rolls. The CPS thus supports the conclusion that the voter rolls are inflated with the names of ineligible voters.

In fact, when a similar comparison is made for all states that required registration for the 2004 election, Indiana ranks first as having the largest discrepancy between the official registration numbers and the self-reported rate of registration. Based upon these rates, Indiana's estimate of list inflation is 41.4%[10]. This alone could cause concern amongst election administration officials.

2) Comparison of the voter registration with the voting age population in 2000 and over time. Just as we addressed the situation of some counties using the 2004 information (see the Brown County discussion, supra.), another useful comparison can be made for the 2000 election due to the nearness to the April 1, 2000 Census Date. Such a comparison is based upon contemporaneous data. Comparing the official figures for the 2000 general election registration and turnout with the census numbers of voting age persons for 2000 indicates that

[10] This rate is calculated by dividing the difference between the Official Registration Total and the Self-Reported Registration by the Self-Reported Registration Total (and multiplying by 100 to create a percentage value). Viewed from another perspective, 29.5% of the voter list is 'fluff', i.e., names of non-voters (the difference divided by the Official Registration totals).

there are 12 counties in which the number of registered voters was over 100% of the voting age[11].

From the CPS for the 2000 elections it can be seen that the self-reported rate of registration was 68.5% in Indiana[12], again reflecting list inflation. Based upon the official registration figures, every county but one had a registration rate higher than this self-reported estimate. In fact, the average registration rate for all counties, based upon the official numbers, was 91.3% of voting age, which is 33% higher than the statewide self-reported estimate. Again, at least for 2000, there was clearly a large degree of list inflation. No significant changes in the overall population or the overall registration numbers have taken place since 2000 that would be likely to affect the degree of inflation much[13].

It can also be determined that the relationship of extra voters on the rolls, and the fact that Indiana had the highest degree of list inflation for the 2004

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[11] See Appendix table: "Comparison for All Counties, Registration Rate with Turnout Rate, 2000"

[12] As with all of the CPS VRS data, the number used here is the so-called 'point estimate'. As the results are from a survey, there is a degree of error associated with estimate. Nationwide the error is less than 0.5%. For Indiana it is approximately 1.5 to 2.5 percentage points.

[13] Based upon the biennial estimates of the population, the Census Bureau (NST-EST2004-01) reported that the population of Indiana was 6,091,945 as of July 2000 and 6,237,569 as of July 2004. The state reported a total registration for November 2000 of 4,016,440 and for November 2004 of 4,296,602.

election cycle is a relatively recent situation. In fact, before the implementation of the National Voting Registration Act (so-called Motor-Voter) for the 1994 elections, Indiana had a long period of time when its rate of registration and turnout was generally consistent with the nation[14].

In 1988, the rate of registration in Indiana was 69.71% of VAP compared to a national rate of 70.72%. In 1992, the rate of registration in Indiana was 75.56% of VAP compared to a national rate of 72.18%. In 1988, the rate of turnout in Indiana was 75.67% of VAP compared to a national rate of 70.51%. In 1992, the rate of turnout in Indiana was 72.51% compared to a national rate of 75.90%.

In 2004, based upon an estimated voting age population[15] of 4,592,000 and the official registration and turnout numbers, the rate of registration in Indiana was 93.6% and the rate of turnout was 58.5%. This disparity between the pre-NVRA rates and the post-NVRA rates is significant. There can be little doubt that much of this current disparity, and the list inflation, is due to the increased difficulty which election officials must overcome before they can remove a voter from the rolls for inactivity. Yet it is precisely these extra names that provide the opportunity for election

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[14] See Crocker, op cit.

[15] Note that small inconsistencies may appear in estimates of the voting age population as they are often calculated for different time periods and by different methodologies.

fraud. A voter identification requirement will assist in reducing this opportunity by requiring some proof as to identity.

3) Deceased voters on the list. A step that can be undertaken to review list inflation is to find the names of deceased voters on the list. There is a federal database, compiled by the Social Security Administration on a continuous basis that greatly assists such a review. In fact, this is just what the state did as part of the Quest project following the 2002 elections.

Of course, like any analytical approach, there are caveats worth reviewing at the outset. The federal list, the so-called Death Master File, (DMF) provides only limited information to the database engineer. Alas, the last known street address is not one of the elements on the DMF, only the zip code of the last address. Therefore, a matching scheme needs to be undertaken to assign a degree of confidence in the match. Clearly this depends upon several factors, not the least of which is the degree to which the name is a common name and the number of persons who live in the zip code.

The Quest project identified 55,499 registered voters as potentially matching the names of persons on the DMF. It then applied its own review to assign a degree of confidence for each match. For example, if John Q. Smith, Jr. was identified on the DMF as a deceased person living in zip code 46204, there are several elements to compare against the voter list.

There may be several John Smiths on the voter list; all of these would be compared to the DMF record. If there was no match to the middle initial, or to the last four digits of the social security number (SSN), or to the zip code, then there would be little confidence in believing that any of the John Smiths on the voter list were deceased; and a confidence score of 0 would be assigned. However, other elements can be reviewed. For example, if the last four digits of the SSN matched, that would clearly increase the confidence. The highest degree of match would be a match on the middle initial, the last four digits of the SSN, all 9 digits of the SSN, and the zip code; a confidence score of 10 would be assigned to such a match.

Of the over 50,000 potential matches to deceased registered voters, the number with a confidence score of 5 or more was 35,699 (64.3%), or approximately 2/3 of the initial matches. A match could get a confidence score of 5 by matching on the entire SSN or on the middle initial *and* the zip code. At first blush it would seem that as a percentage basis of the entire 4.3 million registered voters, or at 0.8%, this would not be a very large factor. Based upon approximately 5,500 precincts in the state this would only be about 6 deceased voters per precinct. However, this assumes an even distribution. On the other hand, 35,000 across legislative Districts would average 700 for each of the 50 Senate districts and 350 for each of the 100 House districts.

Therefore, the likelihood that there are so many deceased voters on the voter list also supports the conclusion that there is significant list inflation.

4) Duplicate voters who have moved to another county. The state also undertook another review for list problems, namely a review for potential duplicate registrations. This had some of the same technical problems as the match for deceased voters but was not the same. All of the potential voters were identified on a voter list from a county so at the bare minimum the addresses should have been complete. Alas, a complete address does not mean a match can easily be made. From a data perspective street addresses have a tendency to have multiple elements and despite decades of computerized list development, they are still implemented in Indiana by 92 different jurisdictions, countless hundreds of data entry personnel and millions of voters.

Nevertheless, the 2004 Quest project identified 233,519 potential duplicate registrations. When collapsed to a single voter, this represented 115,176 voters who were potentially on the voter lists more than once[16]. The project mailed out post cards to as many of these addresses as possible[17]. Of the 233,150 post cards mailed out, approximately 41% (95,184) were returned as undeliverable.

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[16] There were about 10,000 instances where there were 3 or more addresses assigned to a potential duplicate.

[17] There were 369 not mailed due to address insufficiencies.

It is also my understanding that this information was forwarded to the county election officials for disposition. There were 27,723 registrations cancelled as part of the post card return project.

5) Duplicate voters who have moved to other states. Of course, just as the check for duplicate voters sought to find potential problem amongst other counties, the same type of analysis should be undertaken for those voters who left the state and/or registered in another state[18]. Until the HAVA lists are available nationwide, this is not a manageable task.

Conclusion: The voter lists are now inherently inflated by the voter retention factor wrought by the National Voter Registration Act of 1993. Many states need to do something to minimize the potential for fraud as extra names *have* accumulated over the decade of implementation of the NVRA. Indiana, more than all other states, has an even greater need to move towards reducing the impact of the list inflation. Indiana has chosen a method to effectively reduce the potential for voter fraud another level by requiring a photographic identification each time a name on the locally developed list, inflated or not, is actually offered for polling place voting. This choice

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[18] "Some 46,000 New Yorkers are registered to vote in both the city and Florida, a shocking finding that exposes both states to potential abuses that could alter the outcome of elections, a Daily News investigation shows." From internet search: http://nydailynews.com/front/story/224449p-192807c.html, accessed October 2005.

allows for consistent application throughout the state; it affects that phase of the election process that has a high potential for abuse (90% of voters vote at the polls); it minimizes the workload on all local election officials; and it helps to minimize the potential for in-person polling place fraud that list inflation could allow for the various locally maintained voter lists without this kind of verification safeguard.

[Attachments Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:05-CV-0634-SEB-VSS
TODD ROKITA, et al.,	)	
Defendants,	)	
WILLIAM CRAWFORD, et al.,	)	
Plaintiffs,	)	
v.	)	
MARION COUNTY ELECTION BOARD,	)	
Defendant,	)	
and	)	
STATE OF INDIANA,	)	
Intervenor.	)	

DECLARATION OF WENDY ORANGE

(Filed Dec. 1, 2005)

Wendy D. Orange, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am Wendy Davis Orange, the Marion County Election Board Administrator.

2. This affidavit is made on my personal knowledge, and I am competent to testify and will testify to the matters stated herein.

3. I am over eighteen years of age.

4. I am a resident of the State of Indiana.

5. From June of 1996 until January of 2001, I served as the Marion County Election Board Administrator. In my capacity as Marion County Election Board Administrator, I was responsible for the administration of elections in Marion County, which included but was not limited to, the preparation of ballots and other documents integral to voting both at the polling place and absentee.

6. From January of 2002 until May of 2004 I served as a Project Manager for Election Systems and Software, Inc. (ESS) with assignments in Florida and Indiana. In my capacity as Project Manager for ESS, I coordinated the implementation of new voting technologies and related procedures.

7. In my capacity as MCEB Administrator and later as Project Manager for ESS in Marion County, I became knowledgeable of the Indiana Election laws and the operational procedures for conducting elections in Marion County, Indiana.

8. Prior to the voter photo identification statute, SEA 483, P.L. No. 109-2005, codified at Indiana Code §§ 3-11-8-25.1 and 3-5-2-40.5, the two security measures for protecting against voter identity fraud at the

polling place were the challenge procedure and signature comparison by the precinct board clerks.

9. The challenge procedure permitted precinct board members and credentialed party challengers the right to challenge a voter's right to vote in that precinct. In my experience, this challenge procedure was not used primarily to verify the voter's identity, but instead was used to verify that a voter met the residency requirements for voting in the precinct.

10. By contrast, the signature comparison by the precinct board clerks was the principal means for verifying the identity of a voter unknown to the board. In Marion County, the precinct board clerks have precinct voter registration lists that contain digital images of each voter's signature on their registration application. Each individual voter who wishes to vote in the precinct polling place must sign the voter registration list next to the digital image of that individual's signature. The precinct board clerk is responsible for comparing the contemporaneous signature with the digital image signature.

11. If the precinct board clerk does not think that the signatures match and that the individual who signed the poll list is attempting to vote in the name of another, the precinct board clerk may challenge the right of that voter to cast a ballot.

12. Because of the limited expertise of the clerks, the time constraints and pressure at the polls, and availability of only one other signature for comparison, it is my opinion that the signature identification

process at the polls is not an effective means for detecting identity fraud. In my experience, I am not aware of a single instance where an individual who wished to vote at a precinct polling place was challenged because of an alleged signature mismatch.

13. The implementation of the new voter photo identification requirement at the polls will significantly enhance the ability of the precinct board clerks and other precinct board members to detect those who falsely identify themselves and will also make the precinct board clerk's identity verification job easier.

14. In Marion County, an individual who desires to vote absentee must sign and submit a written application under oath to the Marion County Election Board.

15. Upon receiving an absentee ballot application, the Marion County Election Board staff verifies that the absentee applicant is registered to vote with the name and address as stated on the application.

16. If an applicant is registered, the staff prepares an absentee ballot and either mails it to the applicant or delivers it to the applicant by means of a Marion County Traveling Absentee Board, which are bipartisan bodies distinct from the Marion County Election Board.

17. After the voter marks the absentee ballot and seals it in the absentee ballot return envelope provided, the voter must sign an affidavit on the outside

of the ballot return envelope attesting to the voter's identity, residency, and personal voting of the ballot inside.

18. The Marion County Election Board receives the mailed absentee ballots and forwards them to the absentee voter's precinct board for counting on election day. Prior to delivering a voter's absentee application and sealed ballot return envelope to the voter's precinct board, the Marion County Absentee Board compares the signature on the voter's application for an absentee ballot with the voter's signature on the affidavit on the absentee ballot return envelope.

19. If the Marion County Absentee Board determines that the signatures match, the Marion County Election Board delivers the voter's absentee application and the voter's sealed absentee ballot return envelope to the proper precinct board for counting.

20. If the signature is questioned by any member of the Marion County Absentee Board, the application and the sealed ballot return envelope are forwarded to the Marion County Election Board for a determination concerning authenticity.

21. In addition to signatures on the voter's absentee application and voter's absentee ballot return envelope, the Marion County Election Board is authorized to use the signature from a voter's registration list and any other independent documents to verify the validity of the voter's signature on the absentee ballot return envelope.

22. If the Marion County Election Board votes unanimously that the signature on the absentee ballot return envelope is valid, the absentee application and the sealed absentee ballot return envelope are forwarded to the proper precinct board to be voted and counted. If the Marion County Election Board votes unanimously that the signature is not valid, the absentee ballot return envelope is marked with a notation regarding the Board's decision to question the genuineness of the voter's signature. The voter's absentee application and sealed absentee ballot return envelope are forwarded to the proper precinct board for the board to compare the signature on the envelope with the digital image from the voter's registration application and to make a final determination regarding the validity of the signature on the sealed ballot return envelope. Finally, if the Marion County Election Board's vote is divided, the ballot return envelope is marked as a disputed ballot and the voter's absentee application and voter's sealed absentee ballot return envelope are forwarded to the proper precinct board where the precinct board makes the final determination regarding the authenticity of the signatures.

23. In my opinion, the signature comparison method used in Marion County provides an effective safeguard against absentee ballot fraud. In fact, in Marion County absentee ballots are routinely rejected due to non-matching signatures.

24. If absentee voters were required to submit photo identification in the absentee ballot return envelope

with their ballots, the secrecy of the ballots would be compromised because election officials could verify the voter's identity only *after* opening the ballot envelope rather than before. Under the current process, no one may open the ballot envelope (which contains the marked ballot) until a final decision has been made concerning the genuineness of the signature on the ballot envelope. When the envelope is unsealed and the ballot is removed, the envelope and ballot are immediately separated. The ballot is cast into the ballot box and the envelope is stored separately so that it can never be traced to the ballot it once contained. If election officials were required to check copies of photo identification submitted in the same envelope with absentee ballots, they would be required to keep at least one document identifying the voter – the photocopy of the photo identification – with the exposed ballot for what may be a lengthy series of examinations by various election officials. This would quite obviously compromise the secrecy of the absentee voter's ballot.

25. The addition of a photo identification requirement would not significantly enhance the absentee voter's identification process because, unlike with voters who vote in person, there is no basis for election officials to make a determination as to the identity of an absentee voter based on a photograph. Neither the Marion County Absentee Board, the Marion County Election Board nor the precinct board would be able to compare the photocopied photo identification with the face of a person standing in

front of them, with another photograph, or with any other point of comparison. Hence, election officials would be unable to determine whether the person in the photograph was the person who submitted the absentee ballot application, voted the absentee ballot, signed the affidavit on the absentee ballot return envelope, and mailed the absentee ballot to the Marion County Election Board.

I declare under penalties for perjury that the foregoing is true and correct. Executed on the 8th day of November, 2005.

/s/ Wendy Davis Orange
Wendy Davis Orange

[LOGO] *Indiana Democratic Party*

RULES OF THE INDIANA DEMOCRATIC PARTY

Revised May 24, 2005

* * *

If the rules of any two interdependent committees conflict, the rules of the committee with the higher jurisdiction in the Party shall prevail.

RULE 6. RULES OF ORDER

Except where inconsistent with these rules or any promulgated under Rule 4, Roberts' Rules of Order shall govern the procedure of all Party committee meetings.

RULE 7. ACCEPTANCE OF RULES

Any person accepting election or appointment in the Party agrees to accept the privileges and penalties provided for by Indiana law and these rules.

III. MEMBERSHIP AND PARTY OFFICE

RULE 8. ELIGIBILITY FOR MEMBERSHIP & PARTY OFFICES

(a) Any legally qualified Indiana voter who supports the purposes of the Party may be a member.

(b) Except where prohibited by law or these rules, any bona fide Party member may participate

fully in Party meetings and be elected to Party office.

(c) A party member may only be a candidate for precinct committeeperson or state convention delegate if:

(1) His or her most recent primary vote was cast in the Democratic primary;

(2) He or she has never voted in a primary and has declared affiliation with the Party; or

(3) The county chair of the county in which the person resides certifies that the person is a Democrat;

(4) A candidate is not disqualified for not having previously voted in a primary election.

(d) A person who has been disqualified under Rule 19 may not serve in the Party in any capacity during the disqualification term.

IV. STATEMENTS OF PRINCIPLE

RULE 9. GENDER EQUALITY

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants,	No. 1:05-CV-00634 SEB-VSS
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNT ELECTION BOARD, Defendant. and STATE OF INDIANA, Intervenor.	

PLAINTIFF MARION COUNTY DEMOCRATIC PARTY'S RESPONSES TO INTERROGATORIES OF INTERVENOR-DEFENDANT STATE OF INDIANA

Plaintiff, Marion County Democratic Party, pursuant to Fed. R. Civ. P. 33, hereby submits its

responses to the Interrogatories of Intervenor-Defendant State of Indiana.

INTERROGATORIES

INTERROGATORY 1:

Please state the name, address and organizational position of the individual(s) answering these interrogatories on behalf of the Marion County Democratic Central Committee.

ANSWER:

Edward Treacy
Chairman
Marion County Democratic Party
603 E. Washington Street, Suite 100
Indianapolis, IN 46204

INTERROGATORY 2:

Please identify by name and address members of the Marion County Democratic Central Committee.

ANSWER:

Edward Treacy
Chairman
Marion County Democratic Party
603 E. Washington Street, Suite 100
Indianapolis, IN 46204

Billie Breaux
P.O. Box 26310
Indianapolis, IN 46226

Barbara Lawrence
7859 N. Chester Ave.
Indianapolis, IN 46240

Tony Duncan
3539 N. Denny
Indianapolis, IN 46205

INTERROGATORY 3:

Are the registered voters "associated with the Democratic Party" referred to in paragraph No. 2 of Plaintiff's Complaint members of the Marion County Democratic Central Committee?

ANSWER:

Registered voters who are members of the Marion County Democratic Central Committee are "associated with the Democratic Party."

INTERROGATORY 4:

Please identify any by-laws of written policies of the Marion County Democratic Central Committee that set forth the requirements for membership in your organization.

ANSWER:

The Marion County Democratic Central Committee does not currently have written policies or bylaws setting forth the requirements for membership. In Indiana, voters do not register as members of a political party but express their allegiance to a political party by asking for that party's ballot at the primary election, attending party meetings or events, contributing to the party's candidates and casting votes for candidates in the general election, among other things.

INTERROGATORY 5:

Is the Marion County Democratic Central Committee claiming associational standing for its members or those "associated with the Democratic Party" or anyone else? If so, please identify for what injuries Plaintiff claims associational standing.

ANSWER:

The Marion County Democratic Party is claiming associational standing for all registered voters in Marion County who have cast ballots in the past and/or expect to cast ballots in the future in federal, state, and local elections on behalf of candidates associated with the Democratic Party. The Marion County Democratic Party is also claiming associational standing on behalf of all registered voters who have associated themselves with the Democratic Party by participating in party activities, including

officers of state and county central committees and appointed or elected precinct election officials or committeepersons. These registered voters have all associated themselves with the Democratic Party. The Marion County Democratic Party contends that any voter who does not currently possess but who is required to obtain a qualifying state or federally-issued photographic identification that complies with the dictates of SEA 483 in order to vote a regular ballot is injured by the fact that he or she will be required to obtain the qualifying photographic identification in order to cast a regular ballot. Any individual who currently possesses a qualifying state or federally-issued photographic identification card will be injured when that card becomes non-qualifying under SEA 483 because of its expiration or any other reason, where that individual would not have otherwise gone to the effort and expense of obtaining a new photographic identification card but for the requirements of SEA 483. Injury to those individuals will occur in the form of the additional expenses that will be incurred in order to obtain the required photographic identification, which may include for some voters as many as three different trips (in addition to the trip to the polls on election day) to obtain and present a photographic identification at the polls. Injury will also occur to those persons associated with the Democratic Party who are unable to obtain the required form of identification because they lack the necessary transportation or physical ability to visit the Indiana Bureau of Motor Vehicles or other state or federal entity that can issue qualifying

identification cards, or who lack the necessary transportation or physical ability to travel to the office of a county election board or circuit court clerk after an election in order to provide the required photographic identification or to sign an affidavit of indigency or religious objection, assuming those options are available to them. Injury will also occur to those individuals who are unable to obtain the required form of identification as a result of BMV rules, policies, regulations, or laws that require the presentation of certain forms of identification in order to obtain a driver's license or photographic identification card. Injury will also occur to those individuals who are denied the right to vote a regular ballot because of their lack of a qualifying photographic identification where the regular ballots are counted of other voters who do not possess and are not required to present such qualifying photographic identification, specifically voters casting an absentee ballot by mail and voters residing in and voting at polling places located in certain state licensed care facilities as permitted by SEA 483. Injury will occur to those registered voters who are denied the right to cast a regular ballot as a result of selective, arbitrary, or differential application and enforcement of SEA 483 between various precinct election boards, county election boards, county clerks, and other election officials. These injuries are made more severe by the fact that the BMV has closed or is in the process of closing numerous license branches in the State of Indiana.

INTERROGATORY 6:

What records, if any, are kept by the Marion County Democratic Central Committee that identify:

v. The financial status of those "associated with the Democratic Party."

vi. Those "associated with the Democratic Party" who possess driver's license.

vii. Those "associated with the Democratic Party" who possess photo ID.

viii. Aggregate voting records of those "associated with the Democratic Party."

ANSWER:

Objection. This interrogatory requests information that is not relevant nor is it likely to lead to the discovery of admissible evidence. Furthermore, the request is unclear regarding what information is sought regarding the "financial status of those associated with the Democratic Party" and the "Aggregate voting records of those associated with the Democratic Party." Without waiving those objections, the Marion County Democratic Party states that it conducted a mail survey of precinct poll workers in Marion County for the purpose of determining whether they had qualifying photographic identification and at least 8 individuals indicated they did not have such identification.

INTERROGATORY 7:

Please identify the particular process Plaintiff used to identify those "associated with the Democratic Party" who would be injured by the implementation of the statute at issue.

ANSWER:

The Marion County Democratic Party conducted a mail survey of precinct poll workers for the purpose of determining whether they had qualifying photographic identification. Any registered voter in Marion County who has voted for Democratic candidates in the past and/or who intends to do so in the future, and who does not currently possess a qualifying photographic identification, will be injured.

INTERROGATORY 8:

Please identify by name and address those "associated with the Democratic Party" that the Marion County Democratic Central Committee was able to determine would be injured by the implementation of the statute at issue.

ANSWER:

To date, the Marion County Democratic Party has identified the following persons who would be injured by implementation of the statute at issue:

1. David Harrison
   5045 W. 52nd Street, Apt. 304
   Indianapolis, IN 46254

2. Constance Andrews
   3946 N. Capitol Ave.
   Indianapolis, IN

3. Barbara J. Smith
   3518 Dr. Martin Luther King Jr. St.
   Indianapolis, IN
   (317) 925-1569

4. Imogene M. Chapman
   2826 S. Pennsylvania St., Apt. B-18
   Indianapolis, IN 46225
   (317) 787-6582

5. Ernest L. Pruden
   901 Ft. Wayne Ave., #616
   Indianapolis, IN
   (317) 226-9141

6. Helen L. Wright
   1163 N. Holmes Ave.
   Indianapolis, IN
   (317) 636-8477

7. Lois E. Holland
   1147 S. Bradley Ave.
   Indianapolis, IN 46203
   (317) 357-3073

8. Ronald Yancey
   420 N. Alton
   Indianapolis, IN

9. Bettie L. Weiss
   3060 Valley Farms Rd., #246
   Indianapolis, IN

INTERROGATORY 9:

Is the Marion County Democratic Central Committee claiming a direct injury to itself? If so, please state that injury with specificity.

ANSWER:

Yes. The Marion County Democratic Party will be harmed to the extent that candidates associated with the party receive fewer votes, and potentially lose elections, as a result of voters associated with the Democratic Party being disenfranchised by application and enforcement of SEA 483 or as a result of the deterrent effect that the substantial burdens imposed by SEA 483 may have on whether registered voters associated with the Democratic Party attempt to cast a ballot. The Democratic Party will also be harmed by the exclusion from the Democratic Party primary of those voters who would vote a regular ballot that would be counted but for application and enforcement of SEA 483. The Democratic Party has the right to associate with individuals who declare themselves Democrats by choosing to vote in the Democratic primary, and excluding individuals without valid photographic identification from the primary election injures the Democratic Party by depriving it of its associational rights.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,
vs.
TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant.
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of DAVID HARRISON, a witness produced and sworn before me, Brandy L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the Office of the Attorney General, 302 West Washington Street, Indiana Government Center South, 5th Floor, Indianapolis, Indiana on the

18th day of November, 2005, at the hour of 11:58 a.m., pursuant to the applicable rules of procedure with written notice as to time and place thereof.

* * *

[6] questions. Mr. Osborn gets a chance to ask questions. Mr. Groth and Mr. Macey can ask questions.

Occasionally, we've had a few objections where someone says I think that question is unfair or not relevant to this lawsuit. What we've done so far is put it on the record and let the witness decide for themselves whether they want to answer or not.

Do you know Mr. Groth?

A. Yes, sir.

Q. And how long have you known Mr. Groth?

A. Oh, a few months.

Q. Okay. And how is it that you know him?

A. Well, I was introduced to him by a sponsor of mine, Ms. Horseman, Attorney Horseman, and she was at that point having me get a voter's registration card and through that discussion and so forth is when I became better acquainted with the Chairman of the Indiana Democratic Group.

Q. And do you know Mr. Macey?

A. No, but if he's a Democrat, I should know him.

I'm a Democrat.

Q. Do you know all the Democrats?

[7] A. No, but I should.

Q. Why is that?

A. Because I'm a Democrat.

Q. Okay. The Ms. Horseman you referred to, is that the former City County Councilman?

A. I think it is.

Q. And she was going to help you do what, get a voter registration card?

A. Yes, sir.

Q. Did she get you registered to vote?

A. Yes.

Q. You are registered?

A. Yes.

Q. Have you voted yet?

A. No.

Q. Will this be the first time you voted?

A. In a number of years, yes.

Q. Like how many years?

A. I'm not sure, but I'm 75 years old, so it's quite a number of years.

* * *

[11] Q. If there would ever be a time that you wanted to leave the Democratic party, hypothetical, and you say, hey, I want to leave the Democratic party, how does one leave the party?

A. He doesn't. Once a Democrat, always a Democrat. I don't believe in switching.

Q. Okay. And so in a general election then, you would vote for the party as opposed to the man or woman?

A. Yeah, the party.

* * *

[13] Q. Okay. Now, since you're over 65, you can also vote absentee just by filling out a piece of paper and saying who you are and you will not be required to have a photo ID to vote absentee.

A. I don't trust that system.

Q. You don't trust that system?

A. No.

Q. Okay. But do you understand that is the case?

A. Because a lot of soldiers vote like that and their votes wasn't counted in the last election according to what I read, absentee.

[14] Q. That might be reason for you to think about switching parties, but that's a whole 'nother discussion.

A. Okay.

Q. You will have a choice to either get a photo ID from probably – the most common is from the Bureau of Motor Vehicles or to vote absentee. Which of those do you think that you would choose?

A. I don't think I should have to pay for a state ID.

Q. If the ID is free, would that make a difference?

A. Yes.

Q. Okay. Now, it is free. The law made it free, but one of the problems that we've ran into is to get a state ID, you need a birth certificate.

A. They don't pay for it?

Q. Do you have a birth certificate, first of all?

A. Oh, yeah, I was born somewhere.

Q. No, no, no, I didn't mean it that way. Do you have one in your possession now?

A. No, sir.

Q. Do you know where you were born?

[15] A. Yes, sir.

Q. Where?

A. Indianapolis, Indiana.

Q. Okay. So you could get a birth certificate here locally from the State Department of Health?

A. If I pay for it.

Q. Yes, the cost is $10.

A. I don't have $10 to pay for that, but I'm proof that I'm here.

Q. Pardon?

A. I'm proof that I was born and I'm here. Why do I need a birth certificate?

Q. I think that there are a lot of reasons. I guess one of the things is that in this day and age, a lot of security reasons are attached to people establishing their identities. I think we're all familiar with that. In 2007, the federal government is going to make you get a federal ID so that will kind of wipe this all out or I don't know about wipe it out, but certainly Indiana is more or less on the forefront as opposed to the tail end as we are on other things.

If you do not have the $10, – are you [16] saying you do not have the $10 to get an ID or to get the birth certificate?

A. Well, basically, no, I don't have that kind of money just to get a piece of paper that says I was born on March the 5th of 1930.

Q. Well, is it that you don't want to spend your money on that or is it that you don't have it?

A. Both.

Q. Have you been to Catholic Charities?

A. Catholic Charities?

Q. The Catholic Center.

A. Oh, I wouldn't go there.

Q. Why not?

A. Right now I'm a Methodist.

Q. Okay. Well, they help Methodists, too, and I just would say to you that they do –

A. Who, the Catholics?

Q. Yes. They are willing to help people. They have a program for the $10 that they will, if you have your birth certificate, they will help you pay that.

A. I didn't know that. But I probably can get it from the Methodists, too.

Q. I'm not sure about the Methodists.

A. Well, I am.

[17] Q. Okay. You think they would help you out?

A. Yes.

Q. So there would be ways to get the $10?

A. Yes.

MR. WEBBER: I have no further questions.

MR. OSBORN: I don't have any questions, Mr. Harrison. Thank you.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,
vs.
TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of CONSTANCE ANDREWS, a witness produced and sworn before me, Brandy L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the Office of the Attorney General, 302 West Washington Street, Indiana Government Center South, 5th Floor, Indianapolis, Indiana on the 18th day of November, 2005, at the

hour of 10:08 a.m., pursuant to the applicable rules of procedure with written notice as to time and place thereof.

* * *

[7] A. I work for the Bureau of Motor Vehicles.

Q. What do you do for them?

A. Issue licenses and photo IDs and things related to the BMV.

[8] Q. What particular branch do you work at?

A. I work at the Midtown Branch.

Q. Do you get involved in the process of making state identification photos?

A. Yes.

Q. And what's your role in that procedure?

A. I take customers' information and the documents that's necessary in order to obtain a first time driver's license or first time ID, Indiana Identification Card, and the documents that's necessary to get them are quite strenuous.

* * *

[15] Q. Basically, the question that was asked, and he's going to renew his objection, so listen to the question. Have you ever – let's put it that way. Have you ever split your ticket?

A. Yes.

Q. When you voted for a candidate outside of the Democrat party, did you consider yourself no longer a Democrat?

A. No.

Q. Do you give money to Democratic party?

A. Yes.

Q. Do you give money to Democrat candidates?

A. No.

Q. Do you attend Democrat functions?

A. Yes.

MR. GROTH: I'm going to object just to be consistent. It's my position that that's your business and none of the State's business, but [16] if you want to answer, – you've already answered it, so –

Q. What is the reason that you tend to vote more Democrat candidates?

MR. GROTH: I object. It gets into the witness' political ideology protected by the First Amendment. You don't have to answer the question if you don't want, why you're a Democrat, but you can if you wish.

Q. And, again, I'm just asking like are there issues that the Democrats – you feel more comfortable with? That's the general question. I'm not trying to dig too deeply here.

MR. GROTH: And you don't have to answer that, but it's up to you.

A. I'm not answering.

Q. Okay. Did you say you do not want to answer?

A. I do not want to answer.

Q. Okay. Do you consider yourself to be a member of the Democrat party?

A. Yes.

Q. How would you quit being a member?

A. I guess when I die.

Q. How would someone who decided they wanted to quit other than yourself who probably is not [17] ever going to make that decision get out or quit the Democrat party?

A. How would they?

Q. Yes.

A. Go to another party and sign up.

Q. And when you say sign up, what do you mean?

A. Get registered under a different party.

Q. Okay. But you know – and this is not a trick question – you don't register under one party or the other in Indiana?

A. Well, I mean to vote I guess on election day in the primary. That would be one way.

Q. That would be one way. Can you think of any other ways?

A. If you get on the mailing list with the party of your choice, they would – I suppose the party would assume you are now joining forces with them.

Q. Thank you. Do you currently have a driver's license?

A. Yes, I do.

Q. Do you recall when you filled this out, which would have been I think in the last six months, answering the question, "Do you own a driver's license?" marking, "No"?

[18] A. I may have made a mistake there.

Q. Okay. So you did have a driver's license?

A. Correct.

Q. And how old are you, Mrs. Andrews?

A. Fifty-two.

Q. Do you intend to vote this primary in May?

A. Yes.

Q. And where will you vote at?

A. I will vote in 2012.

Q. And where is that? Where is the polling place there?

A. It's at 46th and Pennsylvania.

Q. Do you plan on working at that polling place?

A. Not at that one.

Q. So will you vote absentee then?

A. More than likely, yes.

Q. And have you voted absentee other times in your life?

A. Yes.

Q. Okay. But if you didn't work, you do have a photo ID so you would be able to go to your poll and vote; is that correct?

A. Well, I was thinking about getting more identification since this new rule is coming up.

Q. But you do have a driver's license with your identification?

A. I have a driver's license, but if I were to lose it, I'd have to obtain something in order to vote.

Q. But currently you do have a driver's license with ID?

A. Correct, yes.

* * *

[28] Q. And have you kept any records or do you have an estimate as to how many customers you have serviced who have approached you and requested a photo identification or a replacement driver's license?

A. Are you speaking of daily?

Q. Well, yeah. How often do you typically have on a given day?

A. Ten to more.

Q. So we might be talking about 50 or more a week?

A. Yes.

Q. And let's just talk about weekly for the time being. If we assume 50, about how many of those 50 who come to your window for the first time, how many of those have all of the documents that they need to get the photo ID?

A. Well, word of mouth is spreading so people seem to be more conscious of trying to come up with everything that they need because they come in saying, "I've heard you all need my life history," so to speak, and so they try to come prepared and even with that comment that they make, they still fall short of the list that they must adhere to.

Q. And do you have any estimate as to how many a [29] week you turn away for lack of proper documentation?

A. Out of 50, 30.

Q. And of that 30, how many make repeat trips and eventually receive the identification that they're seeking?

A. All of them because apparently it's very necessary for them to have it.

Q. Right. But are there some that you turn away for lack of proper documentation that you have not seen again?

A. Yes. Maybe they went to a different branch after they have gotten everything they needed.

Q. So you don't know what happened then?

A. Right.

Q. So at least half of the people who come to your agency seeking a photo ID do not have all the documents that they need?

A. Yes.

Q. And, therefore, they are not issued photo identification?

A. Yes.

Q. Have you ever had anybody come into your office who did not have a traditional residence, they were either homeless or they

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,	)
Plaintiffs,	)
vs.	)
TODD ROKITA, et al.,	)
Defendants.	)
WILLIAM CRAWFORD, et al.,	)
Plaintiffs,	)
vs.	)
MARION COUNTY ELECTION BOARD,	)
Defendant,	)
and	)
STATE OF INDIANA,	)
Intervenor.	)

The deposition upon oral examination of BARBARA J. SMITH, a witness produced and sworn before me, Brandy L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the Springfield Health Care Center, 6130 Michigan Road, Indianapolis, Indiana on the 18th day of November, 2005, at the hour of 4:06 p.m., pursuant to the applicable rules of

procedure with written notice as to time and place thereof.

* * *

[8] Q. So when you work in Mount Olive, do you vote absentee then?

A. Yes.

Q. Okay. You have to vote absentee beforehand. Okay. The next question was: Do you have a driver's license?

A. No.

Q. And the answer was no?

A. Right.

Q. And you still don't?

A. No. I don't drive.

* * *

[10] Q. I understand that. But under the new law, I think Mr. Macey would agree with that is that it has to have an expiration date, okay, and he'll talk to you about that. So you mentioned that you had worked for the Democrat ward chair over there, Shively, for some period of time or, you know, quite a few years. Do you normally vote a straight Democrat ticket or do you split and vote for other candidates?

A. That's my business. I'm sorry.

Q. Okay. That's all right. As a matter of fact, earlier in the day, to be frank with you, Mr. [11] Groth objected and he said same thing, that you got a privacy right and my response to that, to him and to you, is I'm not asking someone who they're voting for, but just as a general rule. And the reason I'm asking that, Barbara, is they've identified you as a member of the Democratic party –

A. Uh-huh.

Q. – and I'm trying to figure out exactly what that means, so I'm going to ask you some questions about that. I respect your answer. I'm just asking you some other questions and you can say the same if you want. Do you give money to the Democrat party?

A. Sometimes.

Q. Okay. Do you give money to any Democrat candidates?

A. No.

Q. Do you attend any Democrat meetings or events?

A. Some.

Q. Okay. Is there any particular issue that makes you want to support the Democrat party?

A. Yes.

Q. And can you tell me what that is or the things that you find that are attractive about that [12] party?

A. Well, I believe they are fair. When they're in office, they create jobs and try to help the poor people get off the welfare role and I've been a Democrat you might as well say all my life.

Q. Okay. And if there was a candidate, okay, – let's say there was an election for an office, it could be any office, don't even have to say which one it is. If a candidate from a different party, not the Democrat party, you thought was going to help the poor people more, create more jobs, would it still be your inclination to vote for the Democrat or would you be willing to vote for some other candidate?

A. I'd vote for the Democrats.

Q. You would?

A. Uh-huh.

Q. Straight down the line?

A. Uh-huh.

Q. The question that I've asked before and I'll ask you is: Do you consider yourself to be a member of the Democrat party?

A. Yes.

[13] Q. When you're a member of an organization, usually you have the free will hopefully to stop

being a member. How do you stop being a member of the Democrat party?

A. You just stop.

Q. Okay.

A. They don't tie your hands and say you're in it for life. It's your choice as to whether you want to be a Democrat, Republican, independent, liberal or whatever and my choice was to be a Democrat.

Q. And you've been a Democrat I think you said for a long time; isn't that right?

A. Correct.

Q. But even according to your answer just now is you have the -- if you so chose, you could change or you could leave the Democrats at any time, right?

A. Right.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,
vs.
TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of IMOGENE M. CHAPMAN, a witness produced and sworn before me, Brandy L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the home of Imogene M. Chapman, 2826 South Pennsylvania Street, Apartment B-18, Indianapolis, Indiana on the 18th day of November, 2005, at the hour of 2:00 p.m.,

pursuant to the applicable rules of procedure with written notice as to time and place thereof.

* * *

[12] A. I think it was on there.

Q. Yeah, which starts to eliminate the need to have in the old poll book.

A. The thing about the old book is they got so many people on there dead and gone and haven't been around for 100 years and they're still on the book, which to me soaks up your – and you don't have them. You don't have them in either party because, you know, they're both parties naturally. And I knew who they were in both most of them, especially the ones that were around for a long time. I never could understand that.

Q. The difficulty in getting rid of them? You can't understand the difficulty in taking off the deceased and –

A. Yeah, because I even told them where they were. Some of them I did know. A lot of them were in here, I mean these buildings at one time. It used to be a different place around here than it is now. I liked it better then.

Q. How big a precinct is that? I mean about how many voters –

A. I forgot how many they had on there, but you take off about 75 in both parties total and [13] it's not as big. I forgot what it was, I really have.

Q. But under the law today, you know it's very difficult to take them off?

A. I think that's crazy, for 20 years they're dead. You can't vote if you're – can you? Well, maybe you can. Gee whiz, I answered the wrong thing.

Q. Now, did you work as a Democratic clerk primarily?

A. Uh-huh, but I help both of them.

Q. Yes, I understand.

A. Some of them don't, but I did.

Q. I've worked in many polls.

A. Some I really liked and some I didn't. Just like you don't like Cadillac everybody, something wrong with you.

Q. You yourself personally, do you split your vote?

A. I do when I can. I think that's – that's why I never did like primaries because you can't do scratching. Sometimes you like to scratch. Sometimes it's somebody you know or know of or so on and so forth.

Q. Do you consider yourself to be a member of the [14] Democrat party?

A. I'm a Democrat, but not radical. I know some in both parties that are radicals.

Q. Yes, I do, too.

A. I can't see it. I mean, you know.

Q. So in those elections, though, that you pick out and vote for a Republican candidate, let's say, as opposed to a Democrat, that doesn't make you say you're a Republican?

A. Oh, no. No.

Q. So for the most part, by and large, you're with the Democratic party?

A. By and large, I'm a Democrat. A lot of my family were Republicans. Still are.

Q. You seem like you came from a good stock. Do you give money to the Democrat party?

A. I don't have much to give, no. I would if I could, but I'm on limited income.

Q. Okay. Do you give money to Democratic candidates? Same answer?

A. No.

Q. Okay. No. Are you active in the Democratic party, attending meetings or events?

A. Occasionally, Rosemary – you know Rosemary Vandover (phonetic)?

[15] Q. No.

A. Well, she's a –

Q. Precinct committeeman?

A. Precinct committee and something else and sometimes I've gone with her to a few things.

Q. Okay. Is there any particular issue why you associate yourself with the Democrat party as opposed to the other parties?

A. Yeah, I grew up in the depression and FDR was the savior of everybody and basically – of course, I worked in department stores and basically – of course, they pay a lot more money than they did when I was in the work force.

Q. Yes.

A. Considerably more. And in some areas they don't, but I mean – and I always did a little better seemingly under the Democrats than I did under the Republicans. I don't know whether that was just fate or just that's the way it went along. Who knows.

Q. So it started off when you were young –

A. Oh, yeah.

Q. – as a – you saw that FDR and –

A. I was eight years old October 29th, 1929. [16] That's when it all fell to pieces.

Q. And he put people to work, FDR put people to work?

A. Yeah, it took a while, but people weren't mean like they are today. They didn't go around killing people and –

Q. I understand.

A. Best thing we had was John Dillinger.

Q. You mean worse thing we had.

A. And I knew people that were related to him and I guess he came from a wonderful family.

Q. Is that right?

A. Well, that happens.

Q. Yeah. Is it fair to say then that you think the Democratic party is more aligned with your economic interests?

A. Yes.

Q. If –

A. If I had a lot of money, I'll tell you exactly what I'd do.

Q. Okay.

A. I'd change it.

Q. But if there was a candidate in another party, be it GOP, Libertarian now, green party or whatever they have and you thought he or she [17] was more aligned with your economic interests, would you vote for them?

A. Yeah. You can't in the primary, but you can in the election.

Q. Well, why can't you in the primary?

A. Because you can't – you have to declare your politics, declare your politics, and you can't scratch and you couldn't even on the machines either. They were locked. They were locked for your party.

Q. You do understand, though, that in a primary in Indiana you can vote for either party?

A. I never heard of that before.

Q. No, I'm sorry, I didn't say that right. When you walk into the polls, even though you voted Democrat for the last four times, you can say I would like to vote Republican?

A. Yeah, you can do that. I've heard people do it.

Q. Okay.

A. Vice versa.

Q. Yes.

A. But I knew and I thought, "Wait a minute. What are they doing?"

Q. And they call that the crossover vote and some

* * *

[22] before we started you have arthritis –

A. Yes.

Q. – and vision problems also? Okay.

A. I've never been able to see too good.

Q. If you did get to the BMV, do you have the documents necessary to get an ID?

A. What do you have to have?

Q. Do you have a birth certificate?

A. I've got a copy. It's threadbare, but I've got a copy here.

Q. So I will say to you that that's the big hang up. This is not really a question, but make sure you call down there and go through the things that they need because that's one of the issues in the lawsuit. The big one that most people don't have is their birth certificate.

A. I've got my Social Security card, my Medicare card, my picture on my bus thing and a copy of my birth certificate.

Q. The last thing is I think you need something to show your residence.

A. Oh, and my voter registration.

Q. Okay.

A. That 2826 South Pennsylvania Street just drives me insane.

[23] Q. Okay. That shows where you live, though?

A. From 1991 I had the address of 2859, which this is. Well, they weren't going to do nothing about it. So I called the post office and the old guy told me if

I wanted to get my mail, better – actually, by law, they can't take it away from you. They said there wasn't anything out here. I said by law, that's a firewall, you can't move it and it is.

Q. Okay.

A. Then I got them to put a sign out in the back. The guy said you better put it back there so people can find it.

MR. WEBBER: Ms., you're delightful. I have no further questions for you. Mr. Macey may want to ask you some questions.

MR. MACEY: I have a few.

THE WITNESS: Okay.

CROSS EXAMINATION

QUESTIONS BY MR. MACEY:

Q. Would you take out your birth certificate? Because the question I have is: Is it a certified copy of a birth certificate or is it [24] just –

A. My one is – you can see how threadbare the copy – I mean copied from my birth certificate. Its old and it's got a stamp down there.

Q. This looks like it's a photocopy.

A. This is. This is.

Q. This is a photocopy?

A. Yeah, because my birth certificate, I said, you know, it's all – you can see it's about to come in two. I've got it.

Q. But you do have a birth certificate?

A. I do have. That's what this is copied from, oh, yeah. They told me I better copy it because – Social Security told me that when I was down at Social Security a long time back they said because it's going to fall apart. I said, yeah, I know.

Q. I see.

A. No, that's legit.

Q. Right. I'm not questioning that. The issue, though, is whether it would be accepted.

A. You mean, in other words, if I go to that place, I better dig the other one out anyway?

Q. Yeah. And even then, I'm not sure whether – [25] I'm not sure exactly.

A. Here is that – well, you can't see it on there.

Q. There is a seal on the original?

A. Oh, yeah, there's a seal. See, you can see it vaguely there.

Q. Okay. All right. And you do have that in your possession?

A. Yeah, it's locked up.

Q. So you were – this is from Logansport?

A. Uh-huh, I had to write there and you know what that cost me over 60 years ago? Fifty cents.

Q. Okay. But you wrote away and got it?

A. Yes, I did. They didn't give them to you. You know, a lot of times years ago they didn't give them to you. Some of them never even registered them in the State House or – yeah, State House I guess is where you registered.

Q. So if you needed to get a new one, you would have to do it by getting in touch with Cass County?

A. I'd have to get – oh, yeah. I was born. Deer Creek Township, which I didn't know. I don't know one township from another, just like everything else.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,
vs.
TODD ROKITA, et al.,
Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of ERNEST L. PRUDEN, a witness produced and sworn before me, Brandy L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the Office of the Attorney General, 302 West Washington Street, Indiana Government Center South, 5th Floor, Indianapolis, Indiana on the 18th day of November, 2005,

at the hour of 11:14 a.m., pursuant to the applicable rules of procedure with written notice as to time and place thereof.

* * *

[7] Q. And are you still 73 years old?

A. No, today is my birthday?

Q. Oh, happy birthday. So you're 74 now?

[8] A. Yes.

Q. Do you work on precinct boards, election boards at the local polls?

A. Yes.

Q. Often?

A. Well, not often. Since they started – I mean since they –

Q. Often is the wrong word. For a long time I guess I should have said.

A. Not for a long time, no.

Q. So how many elections have you worked?

A. One, actually.

Q. Oh, just the last one?

A. Yes. I think it was the last, yes.

Q. What job did you have for that?

A. I registered the voters. I registered them when they come in to vote, they have to sign.

Q. Oh, you were the clerk?

A. Yes.

Q. Okay. And there is a Republican clerk and a Democrat clerk. Which were you?

A. Democrat.

Q. And where was the polling place?

A. Where I live, 901 Fort Wayne, the Lugar Tower.

Q. Okay. You live in Lugar Tower and there's a [9] polling place right there?

A. Yes.

Q. In your own voting habits, do you ever split your ticket or do you vote straight party ticket?

A. Generally straight.

Q. Have you had occasion to ever vote for a candidate outside the Democrat party?

A. I've thought about it, but I haven't.

Q. Pardon me? You've thought about it, but you –

A. I've thought about it, yeah.

Q. But you've never pulled the trigger on that?

A. No.

Q. Do you give money to the Democratic party?

A. Probably.

Q. Do you give money to any Democrat candidates?

A. No.

Q. Is there a particular issue that makes you want to identify with the Democrats?

A. I was sort of born into it, so I don't remember making a conscious decision to become a Democrat. That's what my family was probably.

Q. And what if you didn't want to be a Democrat anymore, how would you stop being a Democrat?

[10] A. That's a good question. How would I stop?

Q. Yes.

A. That's a good question. I hadn't really thought about that.

Q. Do you consider yourself to be a member of the Democratic party?

A. Yes.

Q. Okay. Now, what if you wanted to quit being a member of the Democratic party, what would you do?

A. That's the same question.

Q. Oh, it is the same question? Okay. I wanted to make sure that it was. I didn't know that I had accurately asked that question. So you don't know how you would quit? Same answer?

A. Well, I suppose I could just change my vote. There isn't any philosophical process that you have to go through to actually change from one to the other, is there? I mean you don't have to realign your thinking so that you say, well, I'll discard this and accept this?

Q. Not that I know of.

A. Okay. So I don't know.

Q. Is there any mechanical thing that you know of that you have to change?

[11] A. Just vote.

Q. So you think the active voting then takes you into or allows you to quit being in one party and take up membership in another?

A. I think the appeal of a particular candidate would cause me to change my vote. As I've said, I've considered it at other times, but I have not. But if some candidate with the particular appeal appealed to me, I would probably change. Thus far, that hasn't happened to the extent that I actually did it.

Q. Following on that same philosophical plan, it's certainly hypothetical, is if eventually there were more candidates that you supported in another party rather than the Democratic party, then would you become a member of that party?

MR. GROTH: Objection, hypothetical. You can answer. He's asking you a purely hypothetical question. I don't know what my answer would be, but if you're willing to try to answer it, –

A. It's okay. Restate it.

Q. I guess you and I were talking and I think I was tracking you pretty well. You were talking about the imaginations you go through with one [12] candidate and maybe, although you haven't, maybe switching. If you reach a point where there are more of those candidates that you support are not in the Democratic party but in another party, then do you become a member of the other party?

A. Well, if there was an individual whose candidacy appealed to me, then I would try to vote for that individual. As far as leaving one party to go to another, unless that was a requirement, I probably wouldn't, but I would vote for the individual if they made it easier. It is difficult to switch or to split the ticket. That is difficult at the polling places.

Q. Difficult how so?

A. Well, you seem to be given a choice of supporting a straight ticket or individuals on that ticket or the other ticket, but you can't do both, not with those machines.

Q. Okay. Did you currently bring your identification with you today?

A. What kind?

Q. Any kind of photo identification. I believe I asked you to bring that with you.

* * *

[24] Q. You were asked some questions by Mr. Webber about your voting patterns. Do you typically vote in the primary election as well as the general election?

A. Yes.

Q. And what primary, what party's primary have you voted in, Democrat, Republican, Libertarian?

A. Democrat.

Q. Democrat?

A. Yes.

Q. So when you go to the primary to vote in the primary election, you have to ask for a Democratic ballot, don't you?

A. Yes.

Q. And that's sort of an outward manifestation of you becoming a Democrat, isn't it?

A. Yes.

[25] Q. Okay. Because you have to announce that publicly, don't you?

A. Yes.

Q. Or at least to the person who's working the polls?

A. Yes,

Q. And Mr. Webber asked you how you stop being a Democrat. We had a witness who he asked that question to and he said you stop being a Democrat when you die. Would you agree with that?

A. I suppose.

Q. Will you stop being a Democrat when you die?

A. I'll be a dead Democrat.

Q. Have you ever voted in the Republican party primary election?

A. No.

Q. Do you have any intention of ever voting in the Republican party primary election?

A. How far does intention go?

Q. Never mind. Do you know any other people who live in Lugar Towers who don't have a state or federal-issued photo ID?

A. I really don't know. They might have been more, you know, serious minded than myself.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
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vs.
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Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of LOIS HOLLAND, a witness produced and sworn before me, Brandy L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the Office of the Attorney General, 302 West Washington Street, Indiana Government Center South, 5th Floor, Indianapolis, Indiana on the 18th day of November, 2005, at the hour of 9:39 a.m.,

pursuant to the applicable rules of procedure with written notice as to time and place thereof.

* * *

[5] Q. And is that here in Indianapolis?

A. Uh-huh.

Q. And what is your age?

A. Sixty-nine.

Q. And are you currently working or are you retired?

A. I just stay at home.

Q. You stay at home?

A. Oh-huh.

Q. Okay. And what activities do you have or hobbies do you have?

MR. GROTH: Objection to relevance.

A. I go to church and I sew and I cook and –

Q. What church do you go to?

MR. GROTH: Objection to the relevance, Doug.

A. Landmark Baptist.

MR. GROTH: Doug, let's not go into all her personal biography. I don't think that's important in this case.

Q. Where is it?

A. Landmark Baptist.

Q. Okay. And where is that located from your home?

A. Five Points and Thompson Road.

* * *

[7] [Q.] Apparently, at one time you answered a survey and I believe it was from the Democratic Marion County Central Committee was sent to your house and you filled out a survey card and from that card, they listed you as being someone who was potentially hurt by that law.

A. I didn't even remember signing it.

Q. Okay. So what happens today then is since your name was on that list, the other side, which is the side I represent, – the Attorney General defends the laws of the State of Indiana – gets to ask you questions, depose you and find out what you do know about the law or how it will affect you, so that's why we're here.

This is a deposition. As I'm talking, you can see the reporter transcribes things. You can see the attorneys. Mr. Osborn is here for the Marion County Election Board. Mr. Groth and Mr. Macey are here for the Marion County Democratic Central Committee and for the State Democratic Party. So we all have an opportunity to ask you questions. I get to go first.

You said you do not recall filling out a [8] card similar to this?

A. I don't remember it, but I probably did. (At this time State's Deposition Exhibit A was marked for identification.)

Q. It's been marked State's Deposition Exhibit A and it basically appears to be two sides photocopied on a sheet of paper. This is not your name. It is Bettie Weiss, but I'm just submitting it to see if you recall that card and you said you can't recall filling it out?

A. Uh-uh. Of course, I'm getting to that age. Alzheimer's kind of hits.

Q. I am too as far as that goes. Have you worked at precinct polling places before?

A. I've worked at Holy Cross twice and I worked at 111 a few years on Stamm Avenue.

Q. So you think maybe four elections that you've worked at?

A. I think a little more than that. I worked since about '95, I think. I don't remember, but I know I've been working a few years there.

Q. What job do you usually hold when you work at the precinct?

A. Clerk.

Q. You're the clerk?

[9] A. Uh-huh.

Q. Are you usually the Democrat clerk or the Republican clerk?

A. Well, I'm usually both of them sometimes. We got one lady about 86 years old that comes in there for half a day sometimes. She's been there for several years. Most of the workers that I work with has been there for several years. Its in my neighborhood really.

Q. And are you asked then to work by the Democrat precinct committeeperson?

A. Uh-huh.

Q. Okay. Who is that?

A. Mrs. Myrick, Virginia.

Q. Do you know how to spell her name?

A. M-Y-R-I-C-K.

Q. Prior to this deposition have you talked to Mr. Groth or Mr. Macey or anyone on behalf of the Democrat party?

A. No.

Q. Did you talk to anyone in the Democrat Marion County Central Committee about it?

A. I talked to Mr. Myrick. I didn't understand what it was about.

Q. Okay. And that would have been Virginia's [10] husband?

A. Yes.

Q. And did he explain to you what –

A. Yeah.

Q. – the case was about?

A. He's the one that gave me my registration card in 1998 and I didn't know him then, but they called me to work and then I found out who they were.

Q. And what did Mr. Myrick explain to you?

A. He said that Republicans was for it and the Democrats was against it because of people in the nursing homes.

Q. Okay. What I explained to you about the law before about showing a photo identification at a polling place, that was his understanding also, though?

A. Uh-huh.

Q. Have you ever voted for a candidate who was not a Democrat?

* * *

[13] A. Not that I recall. I usually vote in the primary and the election both, but I usually vote Democrat.

Q. Do you give money to the Democrat party?

A. No.

Q. Do you give money to any Democrat candidates?

A. No.

Q. Do you attend any Democrat meetings?

A. I have attended a few, yeah.

* * *

[15] Q. Do you always vote a straight party ticket?

MR. GROTH: Again, same objection. You don't have to answer that if you don't want to.

A. Sometimes, Not always.

Q. What is the main reason why you tend to vote for more Democrat candidates?

MR. GROTH: Objection. You don't have to answer that either. He has no right to inquire into your political ideology or why you vote a certain way.

A. Well, I usually like to vote for the person I think will do the best job.

Q. You like to what?

A. Vote for the person I think will do the best job. That don't always happen.

Q. If there were two candidates then and one of them you though did a better job who was not a Democrat, you would be willing to vote for them?

A. I don't know.

* * *

[17] my house.

Q. Have you ever voted absentee in your life?

A. Yeah, when I worked at Holy Cross I voted absentee.

Q. Okay. Because Holy Cross was out of your precinct?

A. Uh-huh. That's the first time I worked with Holy Cross, two times, and then I worked at 111 for a few years.

Q. And so if you're going to work out of your precinct on election day, then that's one of the reasons you would give for voting absentee?

A. Uh-huh.

Q. Now, do you intend to vote in the May primary?

A. I hope so, if I live that long.

Q. Okay. Now, would it be your intention to get some kind of – there's a State ID that you can get at the Bureau of Motor Vehicles with your photo on it. Do you intend to do that before the primary?

A. If it's required, I can do it, but I don't know.

Q. Do you still drive yourself?

A. No.

Q. How would you get to the BMV to get a –

[18] A. My husband would take me. He takes me to work.

Q. Pardon?

A. He takes me to work.

Q. And where is that?

A. When I go to the polls.

Q. Oh, to the polls. I see. Does he also drive you to church then?

A. Oh, yeah.

Q. So you are able to get out of the house with your husband as the chauffeur?

A. As a matter of fact, he's the one that pushes me out the door to go to church. I probably wouldn't get there.

MR. WEBBER: Well, thank you, Mrs. Holland. I have no further questions at this time. Bill might want to ask you a few questions.

CROSS EXAMINATION
QUESTIONS BY MR. GROTH:

Q. I just have a couple of questions for you. Where were you born?

A. Livingston, Tennessee.

[19] Q. And were you born in a hospital?

A. No, I was born at home, but I have a birth certificate.

Q. Is it a copy or an original?

A. It's copied. If you want to see it, it's copied from my family Bible. I had to get it in '56 or '55 when I went to work.

Q. Thank you.

A. And that's my registration.

Q. So you've retained your voter registration card since you were last registered in 1988; is that correct?

A. Yes.

Q. And you understand that if you take this to the polls, they won't let you vote if you don't have a photo ID under this new law? Did you understand that?

A. Well, maybe I can get one.

Q. Yeah. And do you understand that even if you took your birth certificate to the polls, they still wouldn't let you vote?

A. No, I didn't know.

Q. Has anybody told you what steps you would have to take in order to get the type of photo identification that you would need to vote in [20] the next election?

A. No.

Q. Does your husband work? Does he have a job?

A. He's retired.

Q. How far do you live from the closest BMV branch?

A. Not very far.

Q. Is it walking distance or would you have to drive?

A. We'd have to drive. I think there's one on South Emerson.

Q. And about how many miles is that from where you live?

A. Oh, it would probably be four or five, I don't know. Not very far.

MR. GROTH: That's all I have.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al.,
Plaintiffs,
vs.
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Defendants.

WILLIAM CRAWFORD, et al.,
Plaintiffs,
vs.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

The deposition upon oral examination of ROBERT G. YANCEY, a witness produced and sworn before me, Brand L. Bradley, Notary Public in and for the County of Hamilton, State of Indiana, taken on behalf of the State of Indiana at the home of Mr. Robert G. Yancey, 420 N. Alton Street, Indianapolis, Indiana on the 18th day of November, 2005, at the hour of 3:02 p.m., pursuant to the applicable rules of

procedure with written notice as to time and place thereof.

* * *

[6] Democratic Party as well as the Marion County Democratic Party was, "Please identify by name and address those associated with the Democratic Party that you were able to determine would be injured by implementation of the statute at issue," which is by this new law going into effect on the voter photo ID.

A. Yes, sir.

Q. Okay. And one of the people they put down here is No. 8, Ronald Yancey, 420 North Alton. And that's you?

A. Yes.

Q. And that brings us here today to ask you some questions. I've asked questions to all the people – or going to, hopefully, all the people on this list and I have just a short set of questions for you. I think what starts this in process is a survey that was taken by the county party, the Marion County Democratic Central Committee, in which you filled out a card. And I'll see if I can find that. We'll mark that as State's Deposition Exhibit A.

(At this time State's Deposition Exhibit A was marked for identification.)

Q. Do you remember filling that out in a survey [7] card?

A. No.

Q. You don't remember that?

A. No. Where was I doing this at?

Q. I'm not sure where you would have filled it out at. The basis of the card was asking you, "Did you work the Polls in November, 2004?"

A. Yes.

Q. Okay. And so you probably did fill it out and it said, "Do you own a driver's license?"

A. No.

Q. And it said, "Do you have other valid State or Federally-issued Photo I.D.?"

A. My State ID, yes.

Q. Okay. And what kind of ID do you have?

A. Isn't there a State ID?

Q. Yes.

A. I have that.

Q. Oh, do you?

A. Yes.

Q. Do you have that with you?

A. In my wallet.

Q. Will you get that for me, please?

A. Sure.

(At this time there was a discussion [8] off the record.)

Q. Okay. For the record, Mr. Yancey, you've handed me an Indiana Identification Card with your photo on it and an expiration date of 5/31, 2009?

A. Yes.

MR. WEBBER: Okay. So I will hand that to Mr. Macey.

MR. MACEY: Yeah, I will stipulate that that is an Indiana State photo ID with an expiration date, the date that you stated on the record. Thanks, Mr. Yancey.

MR. WEBBER: So, Mr. Yancey, the reason we came out here was to determine whether or not you were going to be able to vote in the May primary if the new law is passed and that's all you need. So you can vote.

THE WITNESS: I hope so.

MR. WEBBER: Yes, I understand that. So I don't think there's any need to go any further. I apologize for taking your time, but the list we thought basically was going to be people that did not have cards. You've got one. You're good to go then, okay? So that's good.

THE WITNESS: I work at the polls.

[9] Q. And you also work there, yes.

A. Right.

Q. You work for the Democrats?

A. Yes.

MR. WEBBER: Well, they got that right. So I have no further questions for you at this deposition.

* * *

IndyStar.com ► Local News ► Metro & State

November 30, 2005

Hamilton says state's voter ID law justified

Star report

Former U.S. Rep. Lee Hamilton, D-Ind., says Indiana was right to adopt a voter ID law last year, but needs to balance that with aggressive efforts to encourage voter participation.

Hamilton was a member of a national bipartisan panel that recently recommended, among other reforms, that all states adopt laws requiring people to show identification before being allowed to vote.

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He will lead a discussion by lawmakers and election officials of that issue and other election reforms Dec. 7 at Franklin College.

Speaking to reporters Tuesday, Hamilton said the national panel led by former President Jimmy Carter and former Secretary of State James Baker, decided that it wasn't enough just to issue their 41 recommendations; they also needed to push for those reforms in their home states.

One reform Hamilton would like Indiana to consider is removing the oversight of elections from partisan control. In Indiana, as in many states, the chief election officer is the elected secretary of state, currently Republican Todd Rokita.

[Original Was A Postcard]

636-8477	YES	NO
Did you work the Polls in November, 2004?	☒	☒
***Do you own a Driver's License**	☐	☑
†Do you have other valid State or Federally-Issued Photo I.D.?	☐	☑

If so, What type of I.D. is it? _____

Name: Helen L. Wright

Address: 1163 N. Holmes Ave.

Age: 1-3-41 (63)

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(Filed Dec. 1, 2005)

Report on *Indiana Democratic Party et al v. Todd Rokita et al.*

Jonathan N. Katz
California Institute of Technology

7 November 2005

I was asked by legal counsel in this case to evaluate the reports of Dr. Marjorie Randon Hershey and Mr. Kimball W. Brace on the impact of Indiana's new requirement that voters present proof of identification before being allowed to vote (Senate Enrolled Act 483).

A summary of my basic findings is as follows:

- Dr. Hershey's report is pure speculation without any quantitative evidence on the likely magnitude and distribution across Indiana's citizens of the law's likely impact.
- Mr. Brace's analysis, while more quantitative than Dr. Hershey's, suffers from several serious statistical flaws that prevent any scientifically valid conclusions to be drawn from it on the likely impact of SEA 483 on voter turnout.

In the next section of the report I review my qualifications. I then examine the reports of Dr. Hershey and Mr. Brace in turn.

1 Qualifications

I am currently Professor of Political Science at the California Institute of Technology. I was also

formerly on the faculty at the University of Chicago and a visiting professor at the University of Konstanz (Germany). A complete copy of my curriculum vitae is in Appendix A.

I received my Bachelor of Science degree from the Massachusetts Institute of Technology and my Masters of Arts and Doctor of Philosophy degrees, both in political science, from the University of California, San Diego. I have also done post-doctoral work at Harvard University and the Harvard-MIT Data Center.

I have done extensive research on American elections and on statistical methods for political science data. I am a member of the Caltech/MIT Voting Technology Project, serving as co-director since October 1, 2005. I have written numerous articles published in the leading journals as set forth in my curriculum vitae. I currently sit on the editorial board of three leading journals – *Political Analysis, Electoral Studies* and *Political Research Quarterly* – and have served as a referee of manuscripts for most of the major journals in my fields of research.

As part of my work with the Caltech/MIT Voting Project, I have a number of current research projects related to the evaluation of elections. For example, I have examined data with my colleague R. Michael Alvarez on manual recounts of elections from Los

Angeles County.[1] I am also working a project jointly with the Election Science Institute (formerly Votewatch) examining audit data from the 2004 U.S. Presidential election in Ohio.

Over the past decade, I have testified or consulted in numerous elections cases involving the Federal Voting Rights Act, the evaluation of voting systems, or the statistical evaluation of electoral data. I have testified or consulted in court cases in the states of Arizona, California, Georgia, Illinois, Maryland, Michigan, Missouri, New Mexico, Oklahoma, Texas, and Washington.

2 Report of Dr. Hershey

Dr. Hershey's report in this case is essentially a literature review of the rather voluminous scholarship in political science, and some allied social sciences, on voters' decisions to turnout in an election that presents no original analysis as to the likely quantitative impact of implementing Senate Enrolled Act 483 (SEA 483) in Indiana. Her overall characterization of the literature, however, is fairly accurate. There is general agreement that increasing costs of voting decreases turnout.

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[1] California law mandates that all jurisdictions randomly select one percent of their precincts to be manually recounted before certifying the vote tallies in any election. I have also personally witnessed two of these recounts.

Most of this literature, as noted in her report, examines the impact on changes in registration requirements, for example, moving the close of registration date closer to the election day. The typical data used in these studies are either survey data, such as from the American National Election Study or the Current Population Study, or aggregate state level returns that are compared over time or across localities. Since there is both temporal and cross-sectional variation in registration laws, the quantitative impact of different implementations of registration laws on voter turnout can be scientifically assessed much in the same way that the effect of a drug can be examined by comparing treated and control groups.[2]

There are no states or localities that have implemented an identification requirement as described in SEA 483 to the best of my knowledge.[3] In fact, even if there were such a jurisdiction, an argument would have to be made as to why both its implementation as well as its underlying demographic and political make-up was similar enough to be informative about

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[2] Although some care must be taken because unlike clinical drug trials, the choice of registration law is not random. There are appropriate statistical models that can account for this selection effect, however.

[3] There are a number of other states, for example, Georgia, that have enacted similar legislation, but I do not know of any scientific studies that have examined the impact of these new laws yet.

the likely impact of the voter identification requirements adopted in Indiana. Instead, Dr. Hershey is left to purely speculate by analogy to the findings about voter registration in the literature. These speculations are not quantitative, therefore there is no real way to assess the substantive impact on voter turnout of the new law. I also note that there is not any attempt to measure the uncertainty in this "forecasted" impact as is generally accepted scientific practice. There must be at least some uncertainty since Dr. Hershey (as well as Mr. Brace) are attempting to forecast the law's impact on future elections.

Further it is not clear to me that voter registration is a particularly good proxy for understanding the likely impact of the voter identification law, since all voters must register in order to vote, but a good number of registered voters likely already have acceptable identification.[4] This is noted by Dr. Hershey in her report where she goes on to say that "[t]herefore the impact of the new law on voter turnout would be considerably smaller [than a change in the voter registration system]." (p.12). But the real question is how much smaller would it be? Dr. Hershey's report presents no evidence to this crucial question.

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[4] In fact, the change in the law will likely increase the number of citizens of Indiana who will have state or federally issued identification. See my discussion of Mr. Brace's report below.

Dr. Hershey then goes on to opine that Indiana's new identification requirements will have differential impact on certain subgroups of voters. In particular, she argues that voters with lower socio-economic status (SES) – i.e., low education and/or income – will more likely be deterred from voting under the new law. Again she is arguing by analogy – without any direct evidence – from the findings on changes in registration laws on turnout. She cites the studies by Wolfinger and Rosenstone (1980) and Leighley and Nagler (1984) as supporting her case for a differential impact. However, in a more recent study by Dr. Jonathan Nagler (the same author that she cited in her report) published in the *American Political Science Review,* the leading journal in political science, casts doubt on this claim in the registration literature. In the conclusion to his newer study Dr. Nagler states "[t]he modest contribution of the empirical research presented here is to show that what was thought to be a fact, namely, that poorly educated persons are more deterred from voting by registration laws than well-educated persons, is not a fact." (Nagler 1991:1402). Therefore, any suggested differential impact by SES is not even a finding with regard to registration laws and cannot, therefore, form the basis of her claims about the likely differential impact of the new voter identification law.

3 Report of Mr. Brace

The report of Mr. Kimball Brace in this case details his efforts to match records from the Indiana's

Bureau of Motor Vehicles (BMV) on residents of Indiana with either a valid drivers license or identification card to a list of registered voters in Marion county. He additionally aggregated this data to use Federal Census data in an attempt to determine the impact of the new voter identification law by socio-economic status. Unfortunately, Mr. Brace's analysis is seriously flawed on a number of grounds and is not, therefore, informative on the likely impact of the SEA 483.

The central question in this case is what will be the impact of the law on the turnout of Indiana voters in *future* elections – in the language of statistics this is the "quantity of interest". Mr. Brace's analysis instead examines what fraction of *current* Marion county registered voters have a valid state identification, either driver's license or identification card. He finds that he is unable to match 8.42% of them even using the loosest of match criteria to the BMV list of individuals with valid state identification (Table C of Mr. Brace's report). Mr. Brace then claims that these potential voters allegedly without identification will be challenged when they go to vote, or in other words, they will be effectively disenfranchised. The implicit assumption is that the new law will have no effect on potential voters future behavior. As we know since the pioneering work of Dr. Robert Lucas on the statistical forecasting of the consequences of changes in economic policy, it is difficult to make such forecasts because individual behavior is not static. Dr. Lucas noted that changes in policy will in general change

the incentives of individuals and thus their observed behavior (Lucas 1976). In fact, this problem is now known as the "Lucas critique" in literature on quantitative policy analysis.[5]

In order to see this more clearly, consider older voters, those 65 and older. In a study from Wisconsin cited by Dr. Hershey, it was found that 23 percent of this group did not have a driver's license or photo identification. Similarly, a survey done by AARP found that 10 percent of registered voters over age 65 in their sample did not have a valid state driver's license or identification card.[6] This does not come as a surprise, since presumably a good number of these older individuals are either unable or unwilling to drive, so there is no reason for them to pay the cost, actual money and time, to maintain their license. However, once the new voter photo identification law takes effect in Indiana a license or identification is now more valuable to these older individuals since it will allow them to vote. It may, therefore, be worthwhile for them to obtain and maintain either a valid driver's license or identification card in the future. In fact, not only does the new law in essence make a license or identification card more valuable, the law

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[5] Dr. Robert Lucas won the 1995 Nobel prize in economics in part for this observation of the dynamic nature of individuals' response to changes in government policy.

[6] Presumably the difference between the two studies, besides they are about different states is that one of the samples is all individuals whereas the other is only registered voters.

also lowers the cost since it allows for the BMV to issue acceptable identification free of charge. In fact, this likely change in behavior is born out in the AARP survey where 58 percent of the respondents without a license or identification said it was at least somewhat likely they would get one in order to vote.[7]

In fact, as we consider older voters, we see another problem with Mr. Brace's analysis, the new voter identification law only applies to voters who are voting in a polling station on election day. Presumably at least some fraction of registered voters over age 65 without a driver's license will vote via an absentee ballot.[8] Absentee voters are unaffected by the new law. Thus, Mr. Brace's study is over estimating the impact of the new law even if there were no other problems with it.

The design of Mr. Brace's study is also likely to over-estimate the likely impact of the new voter identification law for two further reasons. First, he considers only Indiana issued identification. The law

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[7] We should be careful how we generalize this to the entire population of registered voters age 65 or older without currently valid identification because the subsample of respondents who answered this question is only 29. This standard error of this estimate is very large, much larger than the 3.38 percentage points stated for the entire sample based on 843 respondents. However, there is not enough information in the survey for me to calculate an appropriate sampling error for the response to this question.

[8] It is my understanding that under Indiana law any voter over the age of 65 is entitled to vote absentee if they so desire.

does allow Federally issued identification, such as a passport or military identification, as proper proof of identity for the purpose of voting. At least some fraction of registered voters he was unable to match to the BMV list will have Federal identification.[9] Second, Mr. Brace's analysis covers only registered voters in Marion county, which even he recognizes is likely to have the highest number of non-drivers since it is the most urban of the counties and has a metro bus system (Brace Report, p. 5). The quantity of interest in this case is the impact of the new law of turnout on all Indiana voters, not just Marion County voters. Since his analysis is based on a non-representative sample, Indiana voters as a whole, in the language of statistics, his analysis suffers from a sample selection problem, which occurs when we do not draw a representative sample for our population of interest. In general, no valid statistical claims can be made from a study with a non-representative sample unless some further, rather sophisticated, statistical corrections are made. Mr. Brace has made no such corrections.

Turning to Mr. Brace's demographic analysis, it is even more problematic. Since neither the BMV nor

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[9] In fact, some proportion of Indiana's registered voters will be in the active military service or be a family member of an individual on active duty military and covered by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), who vote by absentee ballot and are not affected by the new law but are counted in Mr. Brace's analysis.

the voter registration data contains any demographic information, Mr. Brace was forced to aggregate his data to the level of census block groups in order to estimate the impact of the law on different socio-economic groups. This analysis suffers from all of the problems I have previously pointed out and also suffers from what statisticians and quantitative social scientists call aggregation bias (see King 1997 for a general discussion of the problem and possible solutions). Aggregation bias occurs when we try to make inferences about *individual* behavior, in this case being registered and having a matched BMV record, from data only about *groups* of individuals, such as census data.[10]

The problem can probably best be seen from an example where were we know the true answer. A recent study led by Dr. Andrew Gelman showed that aggregate Republican vote share appears strongly-inversely related to average state income (Gelman, et al. 2005). An untrained analyst might, therefore, conclude that lower-income individuals are more likely to vote Republican. This, however, would be incorrect. As we know from survey data, the relationship is actually reversed at the true individual level. What causes the finding to reverse with the aggregate data? It turns out that the average voter in relatively poor Mississippi was more likely to vote for President Bush than the average voter in relatively

[10] This is known as ecological fallacy in the statistical literature (King 1997).

wealthy Connecticut, thus reversing the correlation. In other words, the aggregate data masked this clear and strong individual level finding.

Instead of aggregate vote share, Mr. Brace attempts to correlate the aggregate fraction of registered voters with matched BMV listings to aggregate income or eduction levels. The fundamental statistical problem is identical to the Gelman, et al. (2005) study. Thus, even though Mr. Brace finds some correlation between socio-economic status and having a state issued identification at the aggregate level, this relationship may be non-existent or reversed at the true individual level. Much like with sample selection problem mentioned above, it is not possible to make any scientifically valid inferences unless fairly sophisticated statistical techniques are used to correct for the potential aggregation bias. These corrections were not done by Mr. Brace.

Finally, Mr. Brace seems to not treat his analysis as a statistical estimation problem even though he is trying to forecast the impact of the SEA 483. However, because this is a statistical estimation problem, Mr. Brace's analysis must include generally accepted estimates of uncertainty since he does not (nor does anyone) know what the actual effect of the new law will be. Without any measure of estimation uncertainty, no scientifically valid inferences can be drawn from his study.

In conclusion, Mr. Brace's report presents no scientifically valid analysis of the impact of SEA 483.

Thus, for example, Mr. Brace's concluding claim that 989,000 registered voters, or any for that matter, in the state could be challenged when they try to go vote in November, 2006 is not supported with his flawed analysis and is pure speculation at best.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	:	
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	:	No. 1:05-CV-00634 SEB-VSS

Washington, D.C.
Friday, November 11, 2005

Deposition of KIMBALL W. BRACE, called for examination by counsel for the Intervenor-Defendant, State of Indiana, in the above-entitled matter, pursuant to notice, the witness being duly sworn by CARLA L. ANDREWS, a Notary Public in and for the District of Columbia, taken at the offices of Jones, Kay, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, at 9:47 a.m., Friday, November 11, 2005, and the

proceedings being taken down by Stenotype by CARLA L. ANDREWS and transcribed under her direction.

* * *

[34] Madam Reporter, I will start again. The reason I said non-matches is because the comparison ultimately that you make, both in education and in median household income, is the lower-income bracket to the higher-income bracket and the lower educational bracket to the higher educational bracket; isn't that correct?

A That's correct.

Q Did you attempt to establish if there was any racial impact to the passage of the new voter ID law in Indiana?

A As part of the calculation and part of the programming, we did look at the racial data, also.

Q There was no specific racial category, though, in your report. Why wasn't there?

A Basically, we could not conclude one way or the other in terms of the distinction in terms of racial categories.

Q When you say you cannot conclude one way or the other whether or not – let me make sure that I can phrase this correctly. You couldn't conclude whether or not race played – a role in whether – in the amount of unmatched names?

A I don't know that we were necessarily looking [35] at whether or not race placed a role. What we were interested in is whether or not – if you look at the various racial categorizations that are in the census, whether the unmatched are more predominantly one race or another race.

Q Okay. That's said much better. I should have just asked you the question what you meant by that. . . .

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	)	
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	)	No. 1:05-CV-00634 SEB-VSS

Supplementary Evidentiary Material by Plaintiffs William Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition of Housing and Homeless Issues, Joseph Simpson

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	)
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	) No. 1:05-CV-00634 SEB-VSS

Affidavit of Melissa Madill

Comes now Melissa Madill, being duly sworn upon her oath, and says that:

1. I am the Executive Director of the Indianapolis Resource Center for Independent Living ("IR-CIL").

2. We assist our clients in obtaining the information necessary to obtain identification cards from the Bureau of Motor Vehicles and in obtaining the cards.

3. We do not assist in paying for the documents, like a birth certificate, that are necessary in order to obtain an identification card.

4. With the passage of the Voter ID law that IRCIL is challenging in this case we will have to devote more of our institutional resources in assisting persons with collecting the documentation necessary to obtain an identification card from the Bureau of Motor Vehicles.

5. This will require us to devote limited staffing resources to this issue and will mean that we will not be able to devote staff to other issues that are important to our clients.

VERIFICATION

I declare under the penalty of perjury that the foregoing representations are true. Executed on: 12-14-2005

/s/ Melissa Madill
Melissa Madill

Prepared by:
Kenneth J. Falk
Attorney at Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	)	
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	)	No. 1:05-CV-00634 SEB-VSS

Declaration of Rev. Leroy S. Dinkins

Comes now Rev. Leroy S. Dinkins, being duly sworn, and says that:

1. I am a member, and currently the Vice President, of Concerned Clergy of Indianapolis.
2. I am a resident of Indianapolis.
3. I currently have a valid driver's license.

4. However, I am strongly opposed to any law that requires me, or any other person to show a driver's license or other photo identification in order to vote.

5. The reason for this is that once a person registers to vote there should be no further need for identification other than the person's signature.

6. Therefore, I would like not to have to show my identification in order to vote.

7. I am also opposed to the identification requirement because some persons will not be able to obtain the required identification or will be able to do so only with great difficulty and therefore they will not be able to vote or will be discouraged from voting.

Declaration

I declare, under penalties of perjury, that the foregoing is true. Executed on:

12-12-05
Date

/s/ Leroy S. Dinkins
Rev. Leroy Dinkins

Prepared by:

Kenneth J. Falk
Indiana Civil Liberties Union

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, et al., Plaintiffs, v. TODD ROKITA, et al., Defendants.	)
WILLIAM CRAWFORD, et al., Plaintiffs, v. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	) No. 1:05-CV-00634 SEB-VSS

Affidavit of Margie Oakley

Comes now Margie Oakley, being duly sworn upon her oath, and says that:

1. I am the Secretary of Concerned Clergy of Indianapolis ("Concerned Clergy") and, as I indicated in my deposition, I have been designated to speak for the organization in this case.

2. Concerned Clergy is dedicated and committed to assuring that persons are registered to vote and do vote.

3. With the passage of the Voter ID law that Concerned Clergy is challenging in this case, Concerned Clergy has already discussed that the organization will have to assist persons with the costs of birth certificates so that they may obtain identification.

4. We have also discussed that Concerned Clergy will have to provide transportation to persons so they can get to the license branch and the Health Department so that they can obtain the identification card from the Bureau of Motor Vehicles in order to vote.

5. Concerned Clergy will therefore have to divert limited funds and otherwise expend its resources because of the challenged statute.

VERIFICATION

I declare under the penalty of perjury that the foregoing representations are true. Executed on: 12-12-05

/s/ Margie Oakley
Margie Oakley

Prepared by:
Kenneth J. Falk
Attorney at Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*,
Plaintiffs,
v.
TODD ROKITA, *et al.*,
Defendants.

WILLIAM CRAWFORD, *et al.*,
Plaintiffs,
v.
MARION COUNTY ELECTION BOARD,
Defendant,
and
STATE OF INDIANA,
Intervenor.

No. 1:05-CV-00634 SEB-VSS

Affidavit of Roderick E. Bohannan

Comes now Roderick E. Bohannan, being duly sworn upon his oath, and says that:

1. I am the past president of the Indianapolis branch of the NAACP and I am currently the head of the local branch Legal Redress Committee.

2. I have been designated to speak for the organization in this case.

3. I am a member of the Indianapolis branch of the NAACP.

4. Although I have an Indiana driver's license, and therefore I have the identification necessary to vote, I strongly object to having to show this photo identification in order to vote. I believe that it should be sufficient to register to vote and sign in to vote at the polls. I believe the photo identification requirement makes it more difficult to vote and voting should be made as easy and burden free as possible.

5. The Indianapolis Chapter of the NAACP has already begun discussing the organizational steps that we will have to take in response to the new voter identification law. We do not have money to assist persons to pay for birth certificates so they can obtain an identification card from the Bureau of Motor Vehicles. However, we will be involved in educational and outreach efforts to inform the public about the law so as to maximize the number of persons who will be able to vote. These efforts will divert our chapter from engaging in other activities inasmuch as we have limited time and membership resources.

Declaration

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12.12.2005.

/s/ Roderick E. Bohannan
Roderick E. Bohannan

Prepared by:

Kenneth J. Falk
Indiana Civil Liberties Union

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, vs. TODD ROKITA, *et al.*, Defendants.	CAUSE NO: 1:05-CV-0634-SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, vs. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

APPENDIX OF EVIDENCE IN SUPPORT OF DEMOCRATS' CONSOLIDATED RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT OF STATE AND COUNTY DEFENDANTS, AND REPLY IN SUPPORT OF DEMOCRATS' MOTION FOR SUMMARY JUDGMENT

* * *

EXHIBIT 25
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY, *et al.*, Plaintiffs, vs. TODD ROKITA, *et al.*, Defendants.	CAUSE NO: 1:05-CV-0634-SEB-VSS
WILLIAM CRAWFORD, *et al.*, Plaintiffs, vs. MARION COUNTY ELECTION BOARD, Defendant, and STATE OF INDIANA, Intervenor.	

SUPPLEMENTAL AFFIDAVIT OF MARJORIE R. HERSHEY

Comes now Marjorie R. Hershey, and after being first duly sworn upon her oath, deposes and says as follows:

1. I am the same Marjorie R. Hershey who submitted a report on behalf of the Democratic Party plaintiffs and which was submitted to the Court on October 31, 2005 in conjunction with the Democrats' Motion for Summary Judgment. The purpose of this Affidavit is to respond to the report submitted by the State Defendants of Dr. Jonathan Katz submitted in connection with the State Defendants' Response to Democrats' Motion for Summary Judgment.

2. The first main point of my report was that the greater the cost of voting, the fewer people there are who will vote. In my report I cited scores of empirical studies that have all come to this same conclusion. Katz agrees that I have characterized the findings of all of those studies accurately, and that it is a consistent finding of the political science literature that when the costs of voting are greater, fewer people will vote. Katz contends that one more empirical test, that is to say a test of Indiana's new photo identification requirements, might somehow produce different results than all of the empirical studies I cited in my report. This reminds me a bit of the definition of insanity – the belief that by doing the same thing over and over again, you can get different results. However, Katz does not present any argument or empirical evidence that the result of the Indiana photo ID law and the new burdens and obligations it imposes on Hoosier voters, particularly those who currently do not possess the required form of photo identification, ought to differ from the scores of cases in which we have seen clear evidence that

raising the cost of voting proportionately reduces the turnout.

3. The second main point of my report is that the requirement posed by Indiana's new photo identification law is a cost imposed on voting. Katz does not dispute that. He makes no argument that this particular cost will somehow behave differently from other costs and fail to reduce voting rates. All he states is that there is no evidence as to exactly what number of voters will be deterred from voting by this increased cost. He does not and cannot dispute that some voters will be deterred from voting by the increased cost, because that is what the literature shows us in a very large number of previous cases. The suppression of any voter turnout is a serious issue because of the importance of the right to vote. We are not talking about somebody being deterred from renting a movie or being permitted to purchase cold medicine. We are talking about reducing the number of people who choose to exercise their most fundamental right in a democracy, the right to vote.

4. My third point is that the impact of this cost will be felt especially by certain socio-demographic groups – elderly people, less affluent people, members of minority groups, and people who reside in big cities where such groups of people are more likely to be found, cities such as Indianapolis, Gary and Fort Wayne. Katz uses one piece of evidence to dispute this point. He says that my characterization of the literature is accurate, with the exception of one article. He claims that this article is sufficient to refute all the

other evidence because it is (a) more recent and (b) more statistically appropriate. The article he cites, Jonathan Nagler, "The Effect of Registration Laws and Education on U.S. Voter Turnout," ***American Political Science Review***, vol. 85 (December 1991), pp. 1393-1405, is a research note, not a full article. Research notes are papers regarded by editors and reviewers as not meriting the journal space that would be required by a full article, but worthy of at least some lesser attention. Although this article was published somewhat more recently than the research it refutes, it in fact uses the exact same data as the other research – the same surveys, the same time period. Although this research note appeared in 1991, political scientists and other students of voting continue to cite the original findings of the academic literature I have cited in my report, which concludes that the cost of voting falls more heavily on disadvantaged groups. In short, although the profession has had ample time to reconsider these findings, this research note was not sufficiently persuasive to cause scholars to do so. Furthermore, I assume that if its findings had been replicated at some point during the past fourteen years, Katz would have pointed that out. So this is basically the only piece of contrary evidence in an otherwise completely consistent body of academic literature.

5. Finally, Katz admits that 42% of older respondents say they were not at all likely to get a photo identification just in order to vote. Thus, he is acknowledging that the photo identification

requirements will selectively affect 42% of older voters who lack driver's licenses. If that is so, then the argument that this percentage might be lessened by having other forms of identification is irrelevant. The fact is that this requirement, in itself, selectively suppresses the vote. All he can argue is that the suppression effect will not be as widespread. But if it exists at all, there is a new and substantial burden on the right to vote.

6. In his general remarks about my argument, Katz claims that I am speculating or "reasoning by analogy." I disagree. If we have extensive evidence that increased costs reduce voter turnout, and if Katz and I agree that the photo identification requirements constitute a cost, then that is an inference derived from direct observation and statistical corroboration. It does not seem to me to be any more speculative than the reasoning that if a poll tax increases the cost of voting for a group, then the poll tax will reduce turnout.

Further affiant sayeth not.

/s/ Marjorie R. Hershey, Ph.D.
Marjorie R. Hershey, Ph.D.

STATE OF INDIANA
COUNTY OF MONROE

Subscribed and sworn to before me by Marjorie R. Hershey on this 22nd day of November, 2005

Signature
/s/ Cheryl K. Ammon
Notary Public

CHERYL K. AMMON
NOTARY PUBLIC STATE OF INDIANA
LAWRENCE COUNTY
MY COMMISSION EXP. MAR. 18, 2008

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218

WILLIAM CRAWFORD, *et al.*,
Plaintiffs/Appellants,
v.
MARION COUNTY ELECTION BOARD,
Defendant/Appellee.

No. 06-2317

INDIANA DEMOCRATIC PARTY, *et al.*,
Plaintiffs/Appellants,
v.
TODD ROKITA, *et al.*,
Defendants/Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana,
No. 1:05-cv-00634-SEB-VSS
The Honorable Sarah Evans Barker, Judge

JOINT SUPPLEMENTAL APPENDIX OF APPELLEES ROKITA, KING, AND ROBERTSON, INTERVENOR/APPELLEE THE STATE OF INDIANA, AND APPELLEE THE MARION COUNTY ELECTION BOARD

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF INDIANA; and KRISTI ROBERTSON and J. BRADLEY KING, Co-Directors of the Indiana Election Division, in their official capacity, Defendants.	)	Civil Action No. _____ 1:06-cv-1000-RLY-TAB

CONSENT DECREE AND ORDER

(Filed Jun. 27, 2006)

The United States of America filed this action pursuant to Section 8 of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, to enforce the State of Indiana's obligations concerning voter registration list maintenance in elections for Federal offices. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 1973gg-9.

The State of Indiana is covered by the requirements of Section 8 of the NVRA with respect to elections for Federal office. *See* 42 U.S.C. §§ 1973gg-1(4), 1973gg-2(b). Section 8(a)(4) of the NVRA requires

that "[i]n the administration of voter registration for elections for Federal office, each State shall ... conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant; or (B) a change in the residence of the registrant. . . ." 42 U.S.C. § 1973gg-6(a)(4). Section 8 allows for the immediate removal of a voter from a registration list when the voter has died, been convicted of a disqualifying crime, or when the voter requests to be removed. *See* 42 U.S.C. § 1973gg-6(c)(2)(B). Section 8 of the NVRA sets forth specific notice procedures and time frames for removing a voter when the State or local county registrar obtains information that a voter no longer lives at his/her registration address of record (*i.e.*, when the State receives undeliverable election mail or returned jury notices). *See* 42 U.S.C. §§ 1973gg-6(b)-(f). The State must comply with these notice provisions and time lines before removing such voters from its registration list.

Notwithstanding these list maintenance obligations, Indiana has failed to conduct an adequate general program of list maintenance that makes a reasonable effort to identify and remove the names of ineligible voters from the voter registration list in elections for Federal office, to remove such ineligible voters, and to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters. As a result, the State has violated the registration list maintenance

obligations under Section 8 of the NVRA, 42 U.S.C. § 1973gg-6.

The United States and Defendants, through their respective counsel, have conferred and agree that this action should be settled without the delay and expense of litigation. The parties negotiated in good faith and hereby agree to the entry of this Consent Decree ("Decree") as an appropriate resolution of the claims alleged in the United States' complaint. The parties agree to waive a hearing and, thus, stipulate that each provision of this Decree is appropriate and necessary.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. *Deceased Voters and Duplicate Registrations.* On or before June 30, 2006, the Indiana Election Division shall distribute notices regarding the more than 29,000 registrants who may be deceased and 290,000 registrations which may be duplicates, which were identified by the State when it implemented the new statewide, computerized database under the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15483(a), to each county voter registration office for appropriate action. The State shall require each county voter registration office to make a determination, consistent with all notice requirements mandated by law, on these potentially invalid registrations by August 2, 2006, including the removal from the list of eligible voters of any voter registration that has been positively identified as being from a deceased

voter or as a duplicate registration. The State shall provide a report to counsel for the United States on or before August 16, 2006, on a county by county basis, regarding the total number of ineligible voters identified as duplicate or deceased in each county, the total number of voters removed in each county, the total number of voters placed on the inactive list in each county, and the number of dead or, duplicate registrations where the county took no action.

2. *Statewide Mailing.* On or before June 30, 2006, the Co-Directors shall take reasonable efforts to identify voters who are ineligible to vote by conducting a statewide mailing of election-related materials, via first class non-forwardable mail, to all registered voters. The program must comply with the requirements of Section 8(b) of the NVRA, 42 U.S.C. § 1973gg-6 and Indiana Code § 3-7-38.2-16. To the extent that any mailing is returned as undeliverable with no forwarding address or a forwarding address outside the registrar's jurisdiction, the State shall send a follow-up notice letter by forwardable mail to the voter and a postage prepaid address verification card, as set forth in 42 U.S.C. § 1973gg-6(c)-(d) and Ind. Code § 3-7-38.2-2, whereby the voter can confirm his or her address. Where the mailing is returned as undeliverable with a forwarding address inside the registrar's jurisdiction, the State shall ensure that voter records are updated in accordance with Section 8(f) of the NVRA. 42 U.S.C. § 1973gg-6(f). The State shall ensure that each county processes returned and undeliverable address verification

cards in accordance with State and Federal law. This program must be completed on or before August 10, 2006.

3. *Report on Statewide Mailing.* On or before August 25, 2006, the State shall provide counsel for the United States with a report that identifies, on a county by county basis, the number of voters who were identified as potentially ineligible through use of the measures set forth in Paragraph 2, *supra,* the number of voters actually removed from the registration database and the total number of voters placed on inactive status after confirmation mailings. In addition, the State will provide the total number of active and inactive voters in each county in the State as of August 25, 2006.

4. *Written Plan for Compliance.* During 2007, the Co-Directors shall develop a written plan for identifying and deleting ineligible voters on the State's computerized database, as required in Section 303(a)(2) of HAVA, 42 U.S.C. § 15483(a)(2). In addition, the plan shall set forth the State's procedure for tracking whether each county voter registration office is complying with the list maintenance requirements of Section 8 of the NVRA, including whether the registration office is identifying and removing voters who have died, been convicted of a disqualifying crime, or who have moved. This plan must include a means of tracking whether county voter registration offices are properly: (1) acting on State-provided information obtained from the statewide voter registration database regarding voters who may have

become ineligible (such as potential deaths or duplicates); (2) researching and acting on other specific information provided in writing by voters that calls into question those voters' continued eligibility to vote at their currently registered addresses, such as jury declinations or county or state tax filings which claim non-resident status; (3) canvassing their registered voter lists to locate voters who have died or moved; (4) using canvass information to update voter registration rolls for voters who have moved within the election jurisdiction consistent with Section 8(f) of the NVRA; (5) sending a forwardable confirmation notice under Section 8(d) of the NVRA to voters who may have moved outside of an election jurisdiction or for whom there is no forwarding information; (6) placing voters who do not respond to the confirmation notice into an inactive status that will indicate the date they were placed in such status; (7) removing inactive voters who do not vote or appear to vote during the two Federal general election cycles following the date the confirmation notice is sent or who indicate in writing that they have moved outside of the jurisdiction; (8) ensuring that eligible voters on inactive status remain on the voter registration list during the period of the two Federal general election cycles following the date the confirmation notice is sent, and that they can cast valid ballots on election day during that period, upon proper assertion of eligibility, if required under state law; and (9) returning eligible inactive voters to active status if they properly reactivate their registration. Where this tracking information indicates that a county voter registration office is

nonconducting list maintenance activity in accordance with the NVRA and State law, the Co-Directors shall contact the county voter registration office to ensure compliance with the law and, if necessary, take appropriate action against the county, including litigation, if it fails to comply with Federal and State law.

5. *Training.* The Co-Directors, in concert with regularly scheduled training programs conducted by the Indiana Secretary of State, shall develop training manuals and conduct regular training of local election officials at least once each year on the proper conduct of list maintenance under Section 8 of the NVRA and State law.

6. *Copies of Materials to Counsel for the United States.* The Secretary and/or the Co-Directors shall provide copies of the following to counsel for the United States for review and comment prior to dissemination or implementation: (1) the written plan for tracking county compliance with the NVRA referred to in Paragraph 4, *supra*; and (2) the written training materials discussed in Paragraph 5, *supra.* Both parties agree to confer during development of the materials discussed in this paragraph to ensure potential disagreements are minimized.

7. *Annual Reporting Requirements.* On or about January 31 of each year, the Secretary and/or the Co-Directors shall provide a report to counsel for the United States that sets forth the total number of active and inactive voters in each county in the State,

as well as the number of registrants removed by each county in the previous year.

8. *Retention of Records.* The State shall retain voter registration and list maintenance records related to the terms of this agreement for the time periods provided in 42 U.S.C. §§ 1973gg-6(I) and 1974. This shall include training materials and other documents related to the State's and counties' list maintenance obligations under the NVRA and State law. The State shall make these records available to counsel for the United States upon request.

9. *Costs.* Each party shall bear its own costs with regard to actions taken by the parties up to and including the entry of this decree.

10. *Binding Nature of Decree.* This Decree is binding on the Co-Directors, their successors in office, employees, representatives, delegates, agents, assigns, and all persons acting on their behalf.

11. *Termination Date.* This Agreement shall remain in effect until June 30, 2009.

Agreed to:

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SO ORDERED this ___ day of _____, 2006

DATED: 07/05/2006

/s/ Richard L. Young

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-2218:

WILLIAM CRAWFORD, et al., Plaintiffs-Appellants, v. MARION COUNTY ELECTION BOARD, Defendant-Appellee.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Cause below: No. 1:05-CV-634 Hon. Sarah Evans Barker, Judge

No. 06-2317: INDIANA DEMOCRATIC PARTY, et al., Plaintiffs-Appellants, v. TODD ROKITA, et al., Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Cause below: No. 1:05-CV-634 Hon. Sarah Evans Barker, Judge

SUPPLEMENTAL APPENDIX OF PLAINTIFFS-APPELLANTS INDIANA DEMOCRATIC PARTY AND MARION COUNTY DEMOCRATIC CENTRAL COMMITTEE

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF INDIANA; and KRISTI ROBERTSON and J. BRADLEY KING, Co-Directors of the Indiana Election Division, in their official capacity, Defendants.	Civil Action No. _____ 1:06-cv-1000-RLY-TAB

COMPLAINT

(Filed Jun. 27, 2006)

The United States of America, Plaintiff herein, alleges:

1. The Attorney General of the United States hereby files this action on behalf of the United States of America to enforce Section 8 of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, regarding Indiana's obligation to perform voter registration list maintenance in elections for Federal office.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. § 1973gg-9.

3. Venue for this action is proper in the United States District Court for the Southern District of Indiana, as set forth in 28 U.S.C. §§ 94 and 1391(b).

PARTIES

4. Plaintiff UNITED STATES OF AMERICA seeks declaratory and injunctive relief pursuant to Section 11(a) of the NVRA, 42 U.S.C. § 1973gg-9(a), which authorizes the Attorney General of the United States to bring this suit to enforce the NVRA, and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

5. Defendant STATE OF INDIANA is covered by the requirements of the NVRA with respect to elections for Federal office. *See* 42 U.S.C. §§ 1973gg-1(4), 1973gg-2(b).

6. Defendants KRISTI ROBERTSON and J. BRADLEY KING are the Co-Directors of the Indiana Election Division. Section 10 of the NVRA requires that "[e]ach State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act." 42 U.S.C. § 1973gg-8. Indiana law establishes that the Co-Directors of the Indiana Election Division are the State officials "responsible

for the coordination of state responsibilities under NVRA." Ind. Code § 3-7-11-1. The Co-Directors are being sued in their official capacities.

CLAIM FOR RELIEF

7. Section 8(a)(4) of the NVRA requires that "[i]n the administration of voter registration for elections for Federal office, each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of - (A) the death of the registrant; or (B) a change in the residence of the registrant. . . . " 42 U.S.C. § 1973gg-6(a)(4).

8. Section 8(b) of the NVRA requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office" shall be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. § 1973 *et seq.*). . . . " 42 U.S.C. § 1973gg-6(b). Section 8(c) of the NVRA further provides that a State "shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters," except for removals based on a voter's death, conviction of a disqualifying crime or a request of the registrant. 42 U.S.C. § 1973gg-6(c)(2)(A) & (B).

9. Section 8 of the NVRA allows for the immediate removal of a voter from a registration list based on death, conviction of a disqualifying crime, or a request of the voter. *See* 42 U.S.C. § 1973gg-6(c)(2)(B). Section 8 of the NVRA also allows a voter to be immediately removed when a voter confirms in writing that the voter has moved outside of the registrar's jurisdiction, such as when a voter has registered to vote in another jurisdiction, in the manner provided by State law. *See* 42 U.S.C. §§ 1973gg-6(a)(3)(A), 1973gg-6(c)(2)(B), and 1973gg-6(d)(A). Section 8 of the NVRA sets forth specific notice procedures and time frames for removing a voter from the official list of registered voters when a registrar obtains information that a voter may have moved. *See* 42 U.S.C. §§ 1973gg-6(b)-(f).

10. Indiana has failed to conduct a general program that makes a reasonable effort to identify and remove ineligible voters from the State's registration list; has failed to remove such ineligible voters; and has failed to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters. As a result, the State has had and continues to have many counties with excessively high registration totals as compared to the voting age population in each county.

11. The Department of Justice ("Department") first raised NVRA-related concerns in an April 7, 2005, letter addressed to the Indiana Secretary of State, with a carbon copy to the Co-Directors. In that letter, the Department specifically noted that

according to 2003 Census estimates Indiana had 23 counties with registration totals that were more than 100% of those counties' voting age populations.

12. According to data collected voluntarily from each State by the Election Assistance Commission ("EAC") from the November 2004 general election, 19 of 92 Indiana counties had more than 100% of their 2004 voting age populations ("2004 VAP") registered to vote. In addition, 23 counties had 95–100% of their 2004 VAP registered to vote, and an additional 25 counties had registration totals of 90-95%.

13. The State's very high registration totals, as compared to the national average, were highlighted in a recent court case. In *Indiana Democratic Party v. Rokita,* the State submitted expert testimony to justify why its new voter identification law was needed to combat election fraud. *See* "Entry Granting Defendants' Motions for Summary Judgment, Denying Plaintiffs' Motions for Summary Judgment, and Denying Plaintiffs' Motion to Strike," 1:05-CV-0634-SEB-VSS (S.D. Ind. 2006). The State's expert testified that Indiana's actual registration totals are 41.4% higher than the number of Indiana citizens who report that they are registered. This was the highest discrepancy in the nation. The expert further stated that there were 233,519 duplicate voter registrations on the State's registration list in 2004.

14. On January 1, 2006, the State launched its new statewide, computerized voter registration database, as required by the Help America Vote Act

of 2002 ("HAVA"), 42 U.S.C. § 15483(a). The new database interfaces with various State agencies, including the Bureau of Motor Vehicles, Department of Health, and Department of Corrections, and helps the State to identify "ineligible voters," as that term has meaning under the NVRA and HAVA. When the State ran a query to identify deceased registrants and duplicate registration applications, it discovered over 29,000 possible deceased registrants on the State's registration lists and nearly 290,000 possible duplicate registrations. None of these duplicate and ineligible voter registrations have been removed from the State's registration database.

15. The Department sent a second letter to the State on May 18, 2006, to the Co-Directors and with a carbon copy to the Secretary of State. The letter again questioned whether the State was complying with the NVRA's list maintenance requirements, especially given the many deceased registrants and duplicate registrations appearing in the statewide database. The letter also pointed to the many counties with registration totals in excess of the voting age population. The Department requested a response by May 25, 2006.

16. One Co-Director, Bradley King, responded on May 25, 2006. In his letter, Mr. King plainly admitted that "Indiana is not currently meeting its voter list maintenance obligations under the National Voter Registration Act (NVRA)."

17. Ms. Robertson did not contact or otherwise respond to the Department's letter.

18. These facts and admissions, as set forth above, demonstrate that the State is and has been in violation of Section 8 of the NVRA, 42 U.S.C. § 1973gg-6. Unless enjoined by the Court, Defendants will continue to violate this section by failing to conduct legally required list maintenance.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United States of America prays for an order:

1. Declaring that Defendants are in violation of 42 U.S.C. § 1973gg-6 because they have failed, *inter alia*, to ensure that the State of Indiana conducts an adequate general program of list maintenance that makes a reasonable effort to identify and remove the names of ineligible voters from the voter registration list in elections for Federal office, to remove such ineligible voters, and to engage in oversight actions sufficient to ensure that local election jurisdictions identify and remove such ineligible voters.

2. Enjoining the Defendants, their agents, representatives, delegates, and successors, and all persons acting in concert with any of them from failing or refusing to comply with the voter registration list maintenance requirements of Section 8 of the NVRA in elections for Federal office;

3. Ordering the Defendants to take all steps necessary to remedy the demonstrated violations of Section 8 of the NVRA in elections for Federal office; and,

4. Ordering the Defendants to provide this Court, within 30 days from the date of the Court's order, a plan to remedy the demonstrated violations of Section 8 of the NVRA, and to affirmatively administer an adequate general program of list maintenance in compliance with the requirements of Section 8 of the NVRA in elections for Federal office. That plan should include, at a minimum: (i) a survey of a local 11 election authorities in the State to determine the status of Indiana's program of list maintenance and the current condition of its voter rolls, as well as the extent of any problems or inadequacies with that program or with those voter rolls; (2) a means to fully remedy past violations of the NVRA's list maintenance requirements, including a statewide mailing to identify voters who have moved; and (3) a means for the State to monitor and ensure it is meeting its obligations under the NVRA to conduct a uniform general program of list maintenance on a regular basis going forward.

5. Plaintiff further prays that this Court order such other and further relief as the interests of justice may require, together with the costs and disbursements of this action.

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PETITIONER'S BRIEF

73 53071 (5) 84pp

No. 07-21

Supreme Court, U.S.
FILED
NOV 5 - 2007

In The

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED FOR REVIEW

Whether an Indiana statute mandating that registered voters seeking to cast their ballots in-person produce a particular form of government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners in No. 07-21 are William Crawford, Joseph Simpson, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, and the Indianapolis Branch of the NAACP. The Indiana Coalition on Housing and Homeless Issues was a party below and originally a petitioner before this Court but has withdrawn from this case.

Respondents are the Marion County Election Board and the State of Indiana. The State of Indiana was allowed to intervene in this case by the district court.

The Rule 29.6 disclosure statement contained in the petition for writ of certiorari remains the same. However, the Indiana Coalition on Housing and Homeless Issues is no longer a party.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated January 4, 2007, is reported at 472 F.3d 949 (7th Cir. 2007), and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App. 1-15). A timely petition for rehearing, with suggestion for rehearing en banc, was denied, with four judges dissenting, on April 5, 2007, and is reported at 484 F.3d 436 (7th Cir. 2007) (Pet. App. 150-55). The decision of the district court was entered on April 14, 2006, and is reported at 458 F.Supp.2d 775 (S.D. Ind. 2006) (Pet. App. 16-149).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Seventh Circuit is dated January 4, 2007. The Seventh Circuit's Order denying the petition for rehearing with suggestion for rehearing en banc was entered on April 5, 2007. The petition for writ of certiorari was filed on July 2, 2007, and was granted on September 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code § 3-11-8-25.1 provides, in pertinent part:

> **Admission of voter to the polls**
>
> (a) Except as provided in subsection (e), a voter who desires to vote an official ballot at an election shall provide proof of identification.
>
> (b) Except as provided in subsection (e), before the voter proceeds to vote in the election, a member of the precinct election board shall ask the voter to provide proof of identification. The voter shall produce the proof of identification before being permitted to sign the poll list.

(c) If:

(1) the voter is unable or declines to present the proof of identification; or

(2) a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification under IC 3-5-2-40.5;

a member of the precinct election board shall challenge the voter as prescribed by this chapter.

(d) If the voter executes a challenged voter's affidavit under section 22.1 of this chapter, the voter may:

(1) sign the poll list; and

(2) receive a provisional ballot.

(e) A voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in an election.

Indiana Code § 3-5-2-40.5 provides:

"Proof of identification"

"Proof of identification" refers to a document that satisfies all the following:

(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

(2) The document shows a photograph of the individual to whom the document was issued.

(3) The document includes an expiration date, and the document:

(A) is not expired; or

(B) expired after the date of the most recent general election.

(4) The document was issued by the United States or the state of Indiana.

Indiana Code § 3-11.7-5-2.5 provides:

(a) A voter who:

(1) was challenged under IC 3-10-1, IC 3-11-8, or IC 3-11-10-26 as a result of the voter's inability or declination to provide proof of identification; and

(2) cast a provisional ballot;

may personally appear before the circuit court clerk or the county election board not later than the deadline specified by section 1 of this chapter for the county election board to determine whether to count a provisional ballot. (b) Except as provided in subsection (c) or (e), if the voter:

(1) provides proof of identification to the circuit court clerk or county election board; and

(2) executes an affidavit before the clerk or board, in the form prescribed by the commission, affirming under the penalties of perjury that the voter is the same individual who:

(A) personally appeared before the precinct election board; and

(B) cast the provisional ballot on election day;

the county election board shall find that the voter's provisional ballot is valid and direct that the provisional ballot be opened under section 4 of this chapter and processed in accordance with this chapter.

(c) If the voter executes an affidavit before the circuit court clerk or county election board, in the form prescribed by the commission, affirming under the penalties of perjury that:

(1) the voter is the same individual who:

(A) personally appeared before the precinct election board; and

(B) cast the provisional ballot on election day; and

(2) the voter:

(A) is:

(i) indigent; and

(ii) unable to obtain proof of identification without the payment of a fee; or

(B) has a religious objection to being photographed;

the county election board shall determine whether the voter has been challenged for any reason other than the voter's inability or declination to present proof of identification to the precinct election board.

(d) If the county election board determines that the voter described in subsection (c) has been challenged solely for the inability or declination of the voter to provide proof of identification, the county election board shall:

(1) find that the voter's provisional ballot is valid; and

(2) direct that the provisional ballot be:

(A) opened under section 4 of this chapter; and

(B) processed in accordance with this chapter.

(e) If the county election board determines that a voter described in subsection (b) or (c) has been challenged for a cause other than the voter's inability or declination to provide proof of identification, the board shall:

(1) note on the envelope containing the provisional ballot that the voter has complied with the proof of identification requirement; and

(2) proceed to determine the validity of the remaining challenges set forth in the challenge

affidavit before ruling on the validity of the voter's provisional ballot.

(f) If a voter described by subsection (a) fails by the deadline for counting provisional ballots referenced in subsection (a) to:

(1) appear before the county election board; and

(2) execute an affidavit in the manner prescribed by subsection (b) or (c); the county election board shall find that the voter's provisional ballot is invalid.

STATEMENT OF THE CASE

In 2005, Indiana adopted a law that requires registered voters who cast their ballots in person to provide current government-issued photographic identification in order to have their ballot counted. Thousands of persons currently do not have the necessary identification and citizens whose eligibility to vote has never been questioned lack identification that meets these requirements. Furthermore, for many persons, obtaining identification that satisfies Indiana's new requirements is a costly, protracted process. For others, it may be impossible.

The State's ostensible justification for enacting the voter identification law was to prevent vote fraud by ensuring that no one impersonates registered voters and casts ballots in their names. Yet there is no evidence that such a crime has ever occurred in Indiana. Nor was any evidence of otherwise undetected

fraud presented to the State Legislature. While enacting an identification law applicable to in-person voting, the Legislature took no steps to curtail the problem about which it actually had some evidence – absentee voting-related fraud. A divided panel of the Seventh Circuit nonetheless held that the State's actions satisfied the heavy burden that the Constitution places on state policies that significantly interfere with the right to vote. That decision should be reversed.

1. In 2005, Indiana enacted legislation that for the first time requires "proof of identification" in order to vote at the polls. IND. CODE § 3-11-8-25.1(b). Prior to the new law, registered voters needed only to sign in at the polls where their signatures would be compared with those on file with election authorities, and the voters could be challenged if the signatures did not match or if their identities were questioned. (District Court decision ["D.Ct."], Pet. App. at 28-29).[1]

[1] Prior to the July 1, 2005 effective date of the identification law, the only time that presenting any sort of identification was required was as mandated by the Help America Vote Act of 2002 ("HAVA"), Pub.L.No. 107-52, 116 Stat. 166 (2002), 42 U.S.C. § 15483. Under HAVA, persons who register to vote must disclose their drivers license number or the last four digits of their social security numbers. 42 U.S.C. § 15483(a)(5)(A). If the applicant has neither a current license nor a social security number, the State will assign a random identification number to the person. If an individual registers by mail and has not previously voted and does not submit with his or her registration a drivers license number or the last four digits of his or her social security number that is matched with existing State records, the first time that he or she votes, either in-person or by

(Continued on following page)

Indiana law also contained, and continues to contain, detailed criminal provisions addressing various forms of election fraud including Class D felonies such as: voting or applying to vote in false name or voting more than once (IND. CODE § 3-14-2-12); unregistered or unauthorized voting (IND. CODE § 3-14-2-9); voting in other precincts (IND. CODE § 3-14-2-11); fraudulently applying for or completing a ballot fraudulently (IND. CODE § 3-14-2-16); hiring or soliciting a person to vote in a precinct where the person is not a voter (IND. CODE § 3-14-2-13); and, an election official allowing persons to vote who are not entitled to do so or who vote by use of an unauthorized procedure. (IND. CODE § 3-14-2-14).

As noted, the ostensible purpose for the new law is to safeguard against in-person impersonation fraud in voting. (D.Ct., Pet. App. at 106-07). However, the

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absentee ballot, the person must provide some form of identification: a current and valid photo identification of some type or a copy of a current utility bill, bank statement, government check, paycheck, or government document showing the person's name and address. 42 U.S.C. § 15483(b)(3)(A), (b)(2). If the person votes absentee he or she may simply send copies of the identifying information, whether photo identification or the other documentation. 42 U.S.C. § 15483(b)(2).

Before the passage of HAVA, the challenge process required the challenger to complete an affidavit, under the penalties for perjury, which could be countered by a counter-affidavit by the prospective voter. (D.Ct., Pet. App. at 29). Following the passage of HAVA, but prior to the voter identification law, the challenged voters cast provisional ballots and the election authorities would then determine if the ballot should be counted. IND. CODE § 3-11.7-5-2. (D.Ct., Pet. App. at 30).

State is not aware of any incidents of attempted or successful impersonation fraud in in-person voting in the State's lengthy history. (D.Ct., Pet. App. at 39).[2] No voter has ever been charged with any crime relating to impersonation fraud in in-person voting, no evidence of impersonation fraud in Indiana was presented to the Indiana legislature while it was considering the voter identification law and none was presented in this litigation. (D.Ct., Pet. App. at 39).

The absence of in-person voter impersonation within Indiana reflects the national experience. The Election Assistance Commission created by HAVA reported "that impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election." United States Elections Assistance Commission, *Election Crimes: An Initial Review and Recommendations for Future Study* 9 (December 2006), http://www.votetrustusa.org/pdfs/EAC/ElectionCrimes.pdf. It further found that many of the allegations of voter

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[2] Petitioners (hereinafter "Crawford, Simpson and the affected groups") sued the Marion County (Indianapolis) Election Board. Indiana intervened to defend the statute. Therefore the respondents will be referred to as "the State."

The county election board in Indiana is required to "[c]onduct all elections and administer the election laws within the county, except as provided in IC 3-8-5 and IC 3-10-7 for town conventions and municipal elections in certain small towns." IND. CODE § 3-6-5-14.

further found that many of the allegations of voter fraud made in the reports and books it analyzed "were not substantiated." *Id.* at 16. The Commission's conclusion comports with the experience of the U.S. Department of Justice. The Public Integrity Section of the Criminal Division of the U.S. Department of Justice reported that in the first three years of its "Ballot Access & Voting Integrity Initiative," nationwide 89 persons in the United States were charged by federal prosecutors for various election related crimes. (District Court Record Document ["R.Doc."] 79, Ex. 2 at 2). There are no specific examples in the report of in-person impersonation fraud, and a number of the offenses clearly involved other forms of fraud, for example, vote buying, voter harassment, conspiring to submit false voter registration information, and providing false information concerning felony status. (*Id.* at 1-4). "[T]he disenfranchisement of voters through antiquated voting systems, errors, mismanagement of registration bases, and intimidation or harassment is a far bigger problem than traditional forms of election fraud." Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* 15 (2003). (R.Doc. 82, Att. 3, Ex. 6).

2. The new identification requirement does not allow the voter to choose from various types of photo identification, but requires a specific and limited form of current identification, IND. CODE § 3-5-2-40.5, which the parties agree is most likely to be either a

drivers license or an identification card issued by BMV. (D.Ct., Pet. App. at 31).[3]

Persons without identification in Indiana:

There are thousands of persons in Indiana of voting age who do not have a current license or identification card. The BMV does not have an estimate of the exact number of persons, although it acknowledges that these persons are present in Indiana. (D.Ct., Pet. App. at 36). The number appears to be at least 43,000.[4] A survey released in 2005 by AARP Indiana notes that 3% of Indiana registered voters above the age of sixty (60) surveyed do not have either a valid license or an identification card. (Joint Appendix ["J.A."] at 33 n.3). These survey results were corroborated by the director of petitioner United Senior Action who testified, based on her experience and conversation with her members, there are many senior citizens who do not have either valid licenses or identification cards. (D.Ct., Pet. App. at 45).

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[3] The only exception to the requirement that all in-person voters present proof of identification is if the voter "votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." IND. CODE § 3-11-8-25.1(e). This exception applies most notably to nursing homes. (D.Ct., Pet. App. at 25; King Dep. at 121, R.Doc. 57, Att. 2).

[4] The trial court, using methodology that was neither "complete [n]or definitive," opined there were 43,000 persons in Indiana of voting age without BMV identification or licenses. (D.Ct., Pet. App. at 69-70 n.43).

In addition to senior citizens, a number of other groups of citizens are significantly less likely than the citizenry as a whole to possess current drivers licenses or BMV identification cards. The record in this case shows that these groups include:

- persons with disabilities, especially disabilities that prevent them from driving, such as blindness (D.Ct., Pet. App. at 45)
- homeless persons (D.Ct., Pet. App. at 44; Ford Aff., Thompson Aff., J.A. at 10, 15-16; *see also* J.A. at 67 ¶ 5 (describing the situation of Kristjan Kogerma, a homeless man with a birth certificate and social security card, but no BMV identification))
- members of racial minority groups (AARP Survey, J.A. at 33 [referring to drivers license rates])
- persons with low incomes (*Id.*)
- persons who live in urban areas (*Id.*).

The extent of the problem of persons without identification is illustrated by the fact that Lafayette Urban Ministries, an organization providing assistance to needy families, noted it had to help approximately 150 people in 2004 who did not have photo identification. (D.Ct., Pet. App. at 36 n.18). Indiana House of Representative Member Crawford, who represents an Indianapolis district that is one of the most economically challenged in Indiana, has been informed by constituents at community events that they do not have the required identification to vote.

(D.Ct., Pet. App. at 52; Crawford Dep. at 10-11, 21-22, 80 and Interrogs. ¶ 1, R.Doc. 65, Att. 17; R.Doc. 86, Ex. 62)

The requirements for BMV identification

There is no cost for the identification card if the applicant does not have a valid license and will be at least eighteen (18) at the time of the next election. IND. CODE § 9-24-16-10(b). The card must be renewed every four years. (D.Ct., Pet. App. at 35). However, obtaining the necessary identification requires more than merely contacting the BMV; the applicant must personally visit a BMV branch and present certain specific documentation to obtain identification. (D.Ct., Pet. App. at 31). The applicant must present a primary document, secondary document, and a proof of residency document or two primary documents and one proof of residency document. IND. ADMIN. CODE tit. 140, r. 7-4-2.[5] A primary document includes an original birth certificate, United States passport, or similar official record. IND. ADMIN. CODE tit. 140, r. 7-4-3(a). (*See* Regulatory Appendix, attached to this

[5] A person applying for a drivers license must also present proof of possession of a social security number. IND. ADMIN. CODE tit. 140, r. 7-4-2. (D.Ct., Pet. App. at 32 n.16). The regulations governing the documentation necessary for the BMV, which are contained in the Appendix to this brief, were enacted after the trial court's decision but are substantially similar to the non-promulgated BMV requirements in effect at the time of the decision. (*Cf.* IND. ADMIN. CODE tit. 140, r. 7-4-2, 7-4-3, with material cited by the trial court at Pet. App. at 31-35).

brief; D.Ct., Pet. App. at 32-33). Secondary documents include such items as a certified academic transcript, a drivers license issued in another state, a valid banking or charge card, a W-2 or 1099 tax form, a Medicare or Medicaid card, or a certified divorce or marriage decree. IND. ADMIN. CODE tit. 140, r. 7-4-3(d). (Regulatory Appendix). The proof of residency requirement is satisfied by documents that specify the person's name and current, non-post office box, address. IND. ADMIN. CODE tit. 140, r. 7-4-3(e). (Regulatory Appendix).

Difficulties in presenting an original birth certificate

Nationwide, millions of persons lack the primary documents that the BMV requires. As many as 7% of United States citizens do not have ready access to citizenship documents such as passports, naturalization papers or birth certificates. Brennan Center for Justice at NYU School of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 2, http://www.brennancenter.org/stack_detail.asp?key=97&subkey=39242&proj_key=76 ("*Citizens Without Proof*"). Citizens earning less than $25,000 a year are more than twice as likely to lack this documentation. *Id.*

Collecting all the information necessary to satisfy the BMV requirements is a daunting process for thousands of potential voters in Indiana. For instance, Therese Clemente does not have a license or

identification card and attempted to obtain one after learning of the voter identification law. (Clemente Aff. ¶¶ 2-3, J.A. at 93). She went to the BMV and brought numerous documents, but when she got there she was told she needed her birth certificate. (*Id.* ¶ 3). She returned home and brought her birth certificate back, but was refused because it was not a certified copy. (*Id.* ¶ 4). She then sent away to Massachusetts, where she was born, to obtain her birth certificate and, after paying $28, she received her birth certificate fourteen days later. (*Id.* ¶ 5). She returned to the BMV branch only to be told the birth certificate was not acceptable because it contained her maiden name, not the married name she has used for more than five decades. (*Id.* ¶ 6, J.A. at 94). She was turned away and was told she had to bring back, on her fourth trip to the BMV, a certified copy of her marriage certificate. (*Id.* ¶¶ 6-7).

As demonstrated by Ms. Clemente, at times the initial problem in meeting the requirements to receive identification is the obtaining of the birth certificate. A person without a sealed birth certificate will have to pay for one. In Indiana this can cost from $12-$20 and can cost more if the person was born in another state. (D.Ct., Pet. App. at 37-38, n.19).[6]

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[6] Indiana Code § 3-11.7-5-2.5(c)(2)(A) allows a voter who voted by provisional ballot to travel to the election authorities and sign an affidavit that he or she is indigent and unable to obtain proof of identification without payment of a fee. The definition of indigency is uncertain. (Sadler Dep. at 37-39, R.Doc. 57, Att. 1). The costs for transportation and parking

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Furthermore, obtaining a birth certificate may be difficult, regardless of costs. Some persons were born at home and do not have a birth certificate. For example, Thelma Hunter was born at home in Tennessee and to her knowledge no certificate exists. (*Id.* at 50). This is not a unique circumstance. (Haith Aff. ¶ 13, R.Doc. 63, Att. 14).[7] If there is an out-of-state birth record and a request is made to retrieve it, it may take months to be delivered. (Thompson Aff. ¶ 9, J.A. at 16).

Worse yet, the requirement that registered voters obtain a birth certificate in order to obtain a BMV identification document may pose a Catch-22, inasmuch as the process for obtaining the birth certificate may itself require the requestor to provide identification. (D.Ct., Pet. App. at 38). For example, a person who goes to the Marion County (Indianapolis) Health Department cannot obtain a birth certificate unless he or she can produce a passport, current student identification, military identification card, or a non-expired drivers license or state identification card.

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imposed on persons who must travel to the BMV and then to the election authorities cannot be waived. (Roberston Dep. at 48-49, R.Doc. 63, Att. 12).

[7] The BMV has created a policy, which it has not announced publicly, that allows persons over the age of sixty-five (65) who do not have birth certificates because their births were not recorded to substitute other documents as a primary document for the purposes of obtaining identification. (Redman Dep. at 9, ex. 3, R.Doc. 57, Att. 3). There is no record that this policy has ever been used. (*Id.* at 11).

(Ullrich Aff. ¶ 6 and attachments, R.Doc. 62, Att. 11).[8] There are also homeless persons who do not have these underlying documents necessary to obtain a birth certificate, regardless of cost concerns. (Ford ¶ 11, J.A. at 12).

Difficulties in presenting secondary and proof of residency documentation

Obtaining the BMV identification is not merely a function of presenting a certified birth certificate. The other documents required by the BMV must be produced as well. Frequently homeless persons, some of whom have voted in the past, do not have the mass of documents necessary. (Ford ¶¶ 13-14, J.A. at 12-13). Kristjan Kogerma, a homeless man, went to the BMV with his birth certificate and social security card, but was denied identification because, being homeless, he did not have proof of an address. (Kogerma Aff. ¶¶ 6, 8 and attachment, J.A. at 66-67).

Similarly, poor people, people who live in nursing homes or persons with disabilities living in congregate

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[8] Failing that, the person will be directed to the Indiana State Board of Health which has an expanded list of documents that can be produced in order to obtain the birth certificate. (*Id.* ¶ 7; D.Ct., Pet. App. at 38). This bureaucratic maze resulted in about one-half of the 150 individuals that Lafayette Urban Ministries attempted to assist in 2004 in obtaining BMV identification not being able to receive identification because the individuals did not have the photo identification needed to obtain a birth certificate. (D.Ct., Pet. App. at 36 n.18).

living situations may not have, or may not be able to access, the information necessary to obtain the identification from the BMV. (Bohannan dep. at 42-43, 91-92, R.Doc. 62, Att. 10; Neimier dep. at 59-62, R.Doc. 62, Attachment 7; Madill dep. at 26-29, R.Doc. 62, Att. 9).

Therefore, given the mass of documents that must be produced, some persons have difficulty in obtaining identification. An employee of the BMV whose job it is to determine if applicants for licenses or state identification cards have with them the appropriate documentation indicated that in a given week she sees fifty potential applicants. (Andrews dep., J.A. at 215, 220-21). Of these, fully 60% must be turned away because they have not brought the appropriate documents with them. (*Id.* at 220-21).

The challenge process and provisional voting

When a person attempts to vote in-person without identification the prospective voter *must* be challenged by the voting officials at the polls, even if the person is known to the officials. IND. CODE § 3-11-8-25.1(c). (D.Ct., Pet. App. at 25).[9] Once the challenge is made the prospective voter can only execute a provisional ballot and only after the person signs an

[9] These officials are five persons comprising the precinct election board and party clerks, all appointed by the county election board. (D.Ct., Pet. App. at 22-23).

affidavit attesting to his or her right to vote in the precinct. IND. CODE § 3-11-8-25.1(d).

In order to have the ballot counted, the person must engage in a time-consuming post-election day process. He or she must appear before the circuit court clerk or county election board to prove identity not later than ten days after the election. IND. CODE §§ 3-11.7-5-1, 3-11.7-5-2.5(a). When appearing the voter must either: (1) present the photo identification demanded by Indiana law and execute an affidavit indicating the applicant is the same person who voted provisionally, or (2) execute the affidavit and also swear that the voter: (a) is indigent and unable to obtain the proof of identification without payment of a fee or (b) has a religious objection to being photographed. IND. CODE § 3-11.7-5-2.5(c). If the person succeeds in doing one of these three things, then the vote will be counted, unless there are other grounds for a challenge unrelated to identification. IND. CODE § 3-11.7-5-2.5(c)-(e). If, however, the potential voter fails to meet the deadline or does not produce or execute the required documentation, "the county election board shall find that the voter's provisional ballot is invalid." IND. CODE § 3-11.7-5-2.5(f).

In particular, Indiana's process affects the indigent and religious objectors. The indigency and religious objection affidavits are not available for voters to sign at the polls – they are only available at the election offices after the day of the election. (D.Ct., Pet. App. at 26). And, an indigent voter or religious objector must pursue the post-election day

process of appearing at the polls, signing an affidavit, voting provisionally, then returning on another day to a remote site to execute another affidavit for each election in which he or she wishes to participate; there is no way to establish indigency or religious objections ahead of time for all subsequent elections.

Before the new identification requirements, challenges could take up to thirty minutes to resolve. (D.Ct., Pet. App. at 30). These challenges, which, unlike the new law, did not require the voter to make additional trips to government offices to attempt to have the vote counted, left some prospective voters extremely intimidated, causing voters to leave without voting, even when the challenges were not meritorious. (*Id.*). With the new law, the opportunities to present challenges have increased. (*Id.*).

Absentee balloting

As indicated, there is no evidence of in-person voter impersonation fraud in Indiana.[10] The one area of voting in Indiana where there has been documented fraud is in the area of absentee balloting. (D.Ct., Pet. App. at 39). Despite this, the 2005 Indiana voter identification

[10] The trial court noted there was anecdotal information about voting fraud in other areas of the country. (D.Ct., Pet. App. at 40-41). However, as indicated above, these anecdotes are effectively countered by formal studies, not mentioned by the trial court. *See also amicus* brief of Brennan Center for Justice at NYU School of Law at 7-14, filed in the United States Court of Appeals in this cause.

law challenged in this case does not require that absentee voters provide any documentary proof of their identity. *See* IND. CODE 3-11-10-1.2.; (D.Ct., Pet. App. at 27 n.10).[11] Instead, it leaves in place the pre-2005 process, under which, when absentee ballots are received, the county election board examines the signatures required on the accompanying affidavit and ballot envelope to see whether they match the registered voter's signature on file. If they do not match, the ballot can be challenged. (D.Ct., Pet. App. at 27 n.10). Otherwise, the ballot is counted.

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[11] The only time a person voting through an absentee ballot by mail is required to produce identification is if the voter falls within the HAVA requirements that are imposed on first-time voters who registered by mail who did not submit with his or her registration a drivers license number or the last four digits of his or her social security number. *See* note 1, *supra*. (D.Ct., Pet. App. at 27 n.10).

In support of its argument that fraud was a possibility in Indiana, the State introduced evidence that Indiana's voter rolls were significantly inflated. (D.Ct., Pet. App. at 39-40). Subsequent to the trial court's decision in this case, the United States brought suit against the State of Indiana and state election officials for failing to comply with their duties under the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-6, to purge ineligible voters from the list. (Complaint, J.A. at 309). The defendants entered into a consent decree conceding that NVRA imposes the requirement to maintain voter registration lists and that they have been derelict in their duties "to conduct an adequate general program of list maintenance. . . . As a result, the State has violated the registration list maintenance obligations under Section 8 of the NVRA." (Consent Decree, J.A. at 300). The State and its officials are now bound to take continuing steps to insure that the voting lists are well-maintained. (*Id.*, J.A. at 301-05).

Many voters, however, cannot respond to Indiana's voter identification requirement by voting absentee. Unlike many other states, which liberally permit absentee voting, Indiana permits only specified categories of voters to cast absentee ballots. *See* IND. CODE § 3-11-10-24 (permitting individuals to vote absentee if they have a specific expectation of being out of the county during the entire time polls are open; will be engaged in election activity away from their precinct; are confined because of illness; are elderly or disabled; are scheduled to work the entire time polls are open; are precluded from voting during the entire time polls are open due to religious obligations; have confidential addresses pursuant to Indiana law; or are eligible to vote in the precinct of a former residence).

3. The petitioners in this case are two elected officials and candidates, and four groups affected by the law. The candidate-officials, Representative Crawford and Joseph Simpson, have constituents, and prospective voters and supporters, who are adversely affected by the law. (D.Ct., Pet. App. at 52-53; Crawford Dep. at 10-11, 22, 29-30, 80, Ex. B, Interrog. ¶ 1, R.Doc. 65, Att. 17; Simpson Dep. at 12-13, 41-43, 62-64, 71, 79-80, Ex. C, Interrog. ¶ 4, R.Doc. 64, Att. 16).[12]

[12] As indicated, Rep. Crawford has constituents who have specifically informed him that, because of the law, they would not be able to vote. Simpson, who is an elected member of the Washington Township (Indianapolis) Board and an elected

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The Indianapolis Branch of the NAACP ("NAACP") has members who have indicated they will not be able to vote because of the law and the organization has further indicated it will have to expend its limited time and membership resources to engage in educational and outreach efforts to inform the public about the law. (D.Ct., Pet. App. 56-57; Bohannan Aff. ¶ 5, J.A. at 289). United Senior Action of Indiana ("USA") is a 15,000-member organization primarily of senior citizens and is designed to advocate for and promote elder issues. (D.Ct., Pet. App. 57). It has members who no longer have licenses or birth certificates. (Neimier Dep. at 25, 69, R.Doc. 62, Att. 7).

The Indianapolis Resource Center for Independent Living ("IRCIL") is a self-help advocacy center for independent living funded through Title 7 of the Rehabilitation Act (29 U.S.C. § 796f) to assist persons with disabilities who comprise its membership. (D.Ct., Pet. App. at 54-55; Madill Dep. at 6, Doc. 62, Att. 9, 17-18, 75-76). The law will require IRCIL to devote its limited institutional resources to assist persons with disabilities in collecting the documentation necessary to obtain the BMV identification which

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precinct committee-person (not a township trustee as noted by the trial court) has been informed by his constituents that they object to the law and believe it is another mechanism to stop them from voting, and he is personally aware that when voters are challenged some will leave the polls. (D.Ct., Pet. App. at 52-53; Simpson Dep. at 12-13, 41-43, 79-80, Ex. C, Interrog. ¶¶ 2, 4, R.Doc. 64, Att. 16).

will, in turn, preclude IRCIL from using its limited resources in other areas of importance to the community of persons with disabilities. (D.Ct., Pet. App. at 55, Madill Aff. ¶¶ 4-5, J.A. at 283). Similarly, petitioner Concerned Clergy of Indianapolis, a membership civil rights organization, will have to expend its limited resources to assist persons in paying for the cost of birth certificates. (D.Ct., Pet. App. at 54; Oakley Dep. at 8-9, Ex. G, Interrogs. ¶ 8, R.Doc. 63, Att. 13; Oakley Aff. ¶¶ 2-5, J.A. at 287).

4. The separate cases brought by Crawford, Simpson, and the affected groups and the Indiana and Marion County Democratic Parties ("Democrats") were consolidated by the trial court and the consolidated case was submitted on cross-motions for summary judgment. (J.A. at 1-3). Crawford, Simpson, and the affected groups argued that the voter identification law is unconstitutional because it imposes a severe burden on the fundamental right to vote and is not narrowly drawn to meet a compelling state interest. (R.Doc. 66).[13] In granting the respondents' summary judgment motion, the trial court held the Democrats had standing and petitioners Crawford and Simpson also had standing to assert the rights of voters who "inadvertently" cannot present photo identification. (D.Ct., Pet. App. at 96). The trial court

[13] The petitioners also claimed the voter identification requirements violated 42 U.S.C. § 1971(a)(2)(A) and the Indiana Constitution. The trial court found against petitioners on these arguments and they are not pursued before this Court.

held that the other petitioners did not have standing. (*Id.*). The trial court further held the statute constitutional in that it did not create a severe burden on the right to vote and the law was reasonable. (*Id.* at 96-117).

5. A divided panel of the Seventh Circuit affirmed the trial court's decision. It concluded that, inasmuch as the Democrats clearly have standing, other standing arguments did not need to be addressed. (Pet. App. at 4). It noted "most people who don't have photo ID are low on the economic ladder." (Pet. App. at 3). It recognized that "even very slight costs in time or bother or out-of-pocket expense deter many people from voting" and the evidence demonstrated "the Indiana law will deter some people from voting." (*Id.*). In analyzing the right to vote, the panel observed that "the benefits of voting to the individual are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote)." (*Id.*) (Court's emphasis). The panel then concluded that the number of persons disfranchised by the voter identification law was small and, the fewer the number of people who would be disfranchised by the law, "the less of a showing the state need make to justify the law." (Pet. App. at 5). Given this deferential standard, the State's asserted interest in preventing fraud was deemed sufficient justification for the law. (Pet. App. at 10).

Judge Evans, in dissent, asserted that Indiana's voter identification law imposed a severe burden on

the right to vote on some portion of eligible voters and therefore should be subject to elevated judicial scrutiny, which it fails. (Pet. App. at 11-15). Judge Wood, writing for the four judges who dissented from the denial of rehearing en banc, argued that this "Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters" and that if even one citizen is deprived of the right to vote, a severe burden on the right to vote is still present. (Pet. App. at 154). Accordingly, she argued that the panel had applied the wrong standard of review to a law that potentially imposed a severe burden on affected voters. (*Id.*)

SUMMARY OF THE ARGUMENT

Indiana has enacted the most stringent and restrictive voter identification requirement in the United States. As a result, even the Seventh Circuit recognized "the Indiana law will deter some people from voting." (Pet. App. at 3). The severe burden imposed by the statute is not, and cannot be, justified. Indiana's voter identification law is therefore unconstitutional.

The Seventh Circuit made three fundamental errors in concluding that the voter identification law did not impose a severe burden. First, it failed to acknowledge that voting rights are burdened not just by absolute prohibitions that disfranchise the voter, but also by state-imposed hurdles that make it more

difficult to vote. Second, the court of appeals wrongly measured the severity of the burden by focusing on the number of individuals affected, rather than the magnitude of the burden imposed on affected individuals. For, in the court of appeals' estimation "the fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer." (D.Ct., Pet. App. at 5). The right to vote is an intensely personal right, *see, e.g., Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989), and unjustified burdens on that right are unconstitutional regardless of the number of voters affected. Just as the state cannot censor one speaker on the theory that others are allowed to speak, it cannot disfranchise even one voter on the theory that others are allowed to vote. Third, the court of appeals erroneously minimized the number of persons adversely affected by the law. Indiana law imposes a new burden on thousands of individuals because many registered voters currently lack the identification that will satisfy the law, many voters will face substantial difficulties in obtaining that identification, and Indiana's provisional voting process for voters who do not possess the required forms of identification itself erects substantial hurdles in the path of voters having their ballots counted.

This Court has long emphasized that, "as a general matter, 'before [the] right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Dunn v. Blumstein*,

405 U.S. 330, 336 (1972) (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)). The State's purported interest in this case – the prevention of vote fraud – cannot meet that test. While combating voting fraud is certainly a compelling governmental interest, *see Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5, 7 (2006) (*per curiam*), the law cannot be sustained merely because Indiana has articulated hypothetical fraud as its concern. It is uncontested there is no evidence that there has ever been any in-person impersonation voting fraud in Indiana. Indeed, studies demonstrate that in-person impersonation fraud in voting is an extremely rare phenomenon anywhere. Given that courts have the duty to determine the legitimacy and strength of the State's interest, *see Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), the State has an obligation to present some evidence to demonstrate the legitimacy of its fraud concerns. The State has failed in this obligation. The need to make this showing is particularly necessary in the context of voting rights, where our nation's history demonstrates repeated efforts have been made to suppress these rights under the guise of beneficent purposes.

Given this lack of credible evidence, the law is not appropriately tailored. There has been no showing that the previous anti-fraud devices, such as signature requirements, in-person observation with the ability to challenge the voter, and criminal penalties, do not provide satisfactory and less restrictive alternatives. Indiana has abandoned these less-restrictive alternatives, yet the State has seen fit to

continue signature comparison as the sole method for combating absentee voting fraud, notwithstanding the fact there has been documented fraud in this area of voting in Indiana. Moreover, the State's reliance on the existence of bloated voter rolls as a reason to fear fraud and require the new law cannot justify the voter identification law because the State has failed in its responsibilities under federal law to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters" from the registration lists, 42 U.S.C. § 1973gg-6(a)(4), a failure that has been corrected by a consent decree quickly agreed to by the State when sued by the United States. The State is doing more than requiring identification. It is requiring a particular and narrow form of identification, while ignoring many other forms that are well-recognized and accepted in other jurisdictions.

ARGUMENT

Registered voters in Indiana who seek to vote in-person must satisfy the most demanding and restrictive voter identification requirement in the United States.[14] Indiana has created a new substantive

[14] Indiana and Georgia are the only two states that require individuals seeking to vote in-person to present photo identification. Like Indiana, Georgia first enacted a photo identification requirement in 2005. Act No. 53, § 59, 2005 Ga. Laws 295. Georgia amended its code and regulations in 2006 to provide

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requirement for persons seeking to vote in-person. The issue is not merely identification, for Indiana has eschewed methods of identification in widespread use in other jurisdictions such as personal affidavits or other forms of identification.[15] Instead, a limited type

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that any registered voter without a photo identification card will be issued one free by his or her county board of registrars based on his or her voter registration application, no further documentation being required. Act No. 432, § 2, 2006 Ga. Laws 3 (codified at GA. CODE ANN. § 21-2-417.1); GA. COMP. R. & REGS. 183-1-20.01(4)(b)2(iii).

The Georgia statute is currently being challenged. *See Common Cause/Georgia v. Billups*, 504 F.Supp.2d 1333 (N.D. Ga. 2007); *appeal pending*, No. 07-14664-CC (11th Cir. Oct. 5, 2007).

Four states have statutes stating photo identification is required, but each have a fail safe provision for voters without photo identification. Louisiana, Michigan, and South Dakota statutes provide if an individual does not possess photo identification he or she may sign an affidavit at the polls and then vote by regular ballot. *See* LA. REV. STAT. ANN. § 18:562(A); MICH. COMP. LAWS § 168.523; S.D. CODIFIED LAWS § 12-18-6.1. Florida voters without acceptable identification are allowed to vote a provisional ballot which is counted if the county canvassing board determines that the signature on the provisional ballot certificate matches the signature on the voter's registration form. *See* FLA. STAT. ANN. §§ 101.043, 101.048(b).

The official website for the State of Hawaii notes voters must have a picture identification. *See* Voting in Hawaii, http://www.hawaii.gov/elections/voters/votehi.htm (last visited Oct. 8, 2007). However, the Hawaii statute only states that a voter "shall provide identification if so requested by a precinct official." *See* HAW. REV. STAT. § 11-136.

[15] For example, in Arizona, a voter who does not possess a form of required identification – a list that includes, *inter alia*, a current utility bill or bank statement -- may cast a provisional

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of identification is required and the failure to comply results in a complete denial of the right to vote. The Seventh Circuit, although finding the law constitutional, recognized that "the Indiana law will deter some people from voting." (Pet. App. at 3). Given the burden imposed by the law and its lack of justification, the Indiana law is unconstitutional.

This Court has repeatedly recognized that the right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also, e.g., Dunn*, 405 U.S. at 336; *Kramer v. Union School District*, 395 U.S. 621, 626 (1969); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). In *Dunn*, this Court struck down a Tennessee durational residency requirement despite the state's purported anti-fraud rationale. There, the Court explained that the Constitution requires "strict review" of laws that "place[ ] a condition on the exercise of the right to

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ballot. *See* ARIZ. REV. STAT. ANN. § 16-579(B). However, once the voter casts a provisional ballot it is the county recorder who is tasked with the duty of verifying the voter's eligibility by comparing his or her signature to the signature on the voter rolls, and no further action is therefore required of the voter. *See* ARIZ. REV. STAT. ANN. § 16-584. In Ohio, a voter without the requisite identification is permitted to cast a provisional ballot after signing an affidavit attesting to his or her identity and eligibility to vote; again, though, the burden is on the county election officials to determine the voter's eligibility, and no further actions are required of the voter. *See* OHIO REV. CODE ANN. § 3505.181. *See also* Petition for Writ of Certiorari at 16-17 n.6-8.

vote," *Dunn*, 405 U.S. at 337 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)): review that asks "whether the exclusions are *necessary* to promote a *compelling* state interest," *id.* (quoting *Kramer*, 395 U.S. at 627) (emphasis in *Dunn*). Thus, this Court squarely directed that "before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Dunn*, 405 U.S. at 136 (internal quotation marks omitted).

Dunn's citation of *Bullock v. Carter* for this point clarifies what constitutes a "condition on the exercise of the right to vote," since *Bullock* in turn defined this phrase by citing *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). *See Bullock*, 405 U.S. at 143 n.20. *Harper* struck down a Virginia statute that, like the law at issue in this case, required an eligible voter to obtain beforehand and present to poll officials on election day a government-issued document (there, a poll tax receipt and here BMV identification) before he or she could vote.

To be sure, this Court has recognized that elections necessarily involve governmental regulation and that "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*. Thus, in *Burdick* itself, which involved a challenge to Hawaii's ban on voting for write-in candidates, the Court held that not every voting regulation should be subject to conventional strict scrutiny. In particular, *Burdick* held that the "mere fact" that Hawaii's law

"tend[ed] to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." 504 U.S. at 433 (quoting *Bullock*, 405 U.S. at 143). Thus, *Burdick* directed that "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). In doing so a court must take into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* But even under the *Burdick* standard, when a challenged regulation subjects the right to vote to "'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

This Court has not held the *Burdick* framework applicable to a restriction that is directly applied to otherwise eligible voters. There is some uncertainty regarding whether the standard articulated in cases involving voter eligibility like *Dunn v. Blumstein*, 405 U.S. 330 (1972), or the standard articulated in ballot access cases like *Burdick* presents the proper standard for reviewing the conditions on the right to vote imposed by the Indiana law now before this Court. But petitioners believe that there is no need for the Court to resolve that question in order to resolve this

case, for the level of scrutiny called for in *Burdick* is sufficiently exacting to invalidate Indiana's photo identification requirement.

I. Indiana's voter identification law is particularly suspect because it places a severe burden on a significant number of voters

The Seventh Circuit makes a number of incorrect conclusions and assumptions in its decision. First, it discounts the burdens imposed by Indiana's photo ID law by noting that these burdens can, in theory, be overcome and thus are not absolute disqualifications. (Pet. App. at 5). Second, it holds that even an unjustified burden on the right to vote is not subject to serious judicial scrutiny unless it disenfranchises an unspecified critical mass of voters. (*Id.*). Finally, it ignores the fact that thousands of Indiana residents are affected by this law, and instead concludes, mistakenly, that the number of persons who are severely burdened by the law, although they exist, are "few." (*Id.*).

A. Proof of a severe burden does not require proof of outright disfranchisement

This Court has stressed that the right of suffrage can be denied by "hurdles" placed in the path of prospective voters as effectively as an outright prohibition on the right to vote. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 150 (1965) (concluding that the Louisiana Constitution and statutes that

required voters to prove their ability to understand Louisiana and United States Constitution was unconstitutional). In *Anderson* the statute was found to be unconstitutional not because it placed an insurmountable barrier blocking third-party candidates, but because it placed "a particular burden" on Ohio's independent voters. *Anderson*, 460 U.S. at 792.

The history of our country is replete with examples of barriers that discouraged voting and were deemed to impose severe burdens on basic constitutional rights, even though they were not insurmountable. For example, poll taxes, even though extremely low in amount and imposing only a "slight economical obstacle for any citizen who desires to qualify in order to vote," nevertheless were successful in depressing voter participation. *Harman v. Forssenius*, 380 U.S. 528, 539 (1965) (quoting H.R. Rep. No. 1821, 87th Cong., 2d Sess., p. 3). In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court invalidated under the Fifteenth Amendment an Oklahoma law requiring those who had not voted in the 1914 general election to register between April 30, 1916 and May 11, 1916. The Court concluded the Constitution "hits onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted." *Id.* at 275. The question, therefore, is not whether Indiana's voter identification requirements disfranchise all persons affected by the law, but whether the requirements place such a particular burden or hurdle in the way of potential voters.

B. The appropriate focus for assessing a challenged law's burdensomeness necessarily requires looking at the law's effect on individual voters

The Seventh Circuit, although acknowledging Indiana's "law will deter some people from voting," also noted that any harm to an individual arising from his or her loss of voting rights was "elusive" and "the fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer." (Pet. App. at 3, 5). The court therefore totally disregarded the weight and significance of burdens on individual voters, so long as a certain unspecified number of voters were not similarly burdened. The rationale for this was that "a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote." (*Id.* at 3) (emphasis in original).

As indicated below, the court of appeals erred in ignoring the fact that the burdens of the voter identification law are felt by thousands of persons. But more fundamentally, the court failed to take into account the basic principle that "[t]he right to vote is personal." *United States v. Bathgate*, 246 U.S. 220, 227 (1918). As this Court has consistently held, "all who participate in the election are to have an equal vote . . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Gray v. Sanders*, 372 U.S.

368, 379-80 (1963). In *Reynolds v. Sims*, 377 U.S. 533, 554, 567 (1964), the Court stressed that "all qualified voters have a constitutionally protected right to vote," and "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." That Indiana's photo identification law may affect few voters is irrelevant if it burdens or debases their right to vote. In *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*), in invalidating recount procedures in the Florida 2000 presidential election, the Court reaffirmed and relied upon the principle of "the equal weight accorded to each vote and the equal dignity owed to each voter." The lower court clearly violated this principle by refusing to accord equal weight and dignity to voters burdened by the photo identification law.

Moreover, this is not an election contest, nor a case such as *Thornburg v. Gingles*, 478 U.S. 30 (1986), in which plaintiffs contend the votes of those without photo identification are "diluted" such that they affect the outcome of elections. This case involves unconstitutional burdens on the right to vote itself. As the Court explained in *Morris*, 489 U.S. at 698, "[t]he personal right to vote is a value in itself," and denial of a citizen's voting rights causes individual harm when it occurs "without more and without mathematically calculating his power to determine the outcome of an election." In its seminal voting rights cases, such as *Smith v. Allwright*, 321 U.S. 649 (1944) (white primary), *Harman v. Forssenius* (poll tax), and *Dunn v. Blumstein* (durational residency requirement),

this Court has invalidated burdens on the right to vote, not because they would have affected the outcome of elections, but because the burdens themselves violated the Constitution. Under this Court's jurisprudence, the constitutionality of the voter identification law must be assessed without regard to whether a certain minimal number of voters are burdened, or whether they could have affected the outcome of an election.[16]

C. The voter identification law severely burdens thousands of prospective Indiana voters

The court of appeals also erred in concluding that the challenged law has little effect on the electorate. Although the precise number is not known, there are thousands of Indiana residents of voting age without the required identification. (*Supra* note 4). Nationwide, studies indicate that from 6 to 11 percent of Americans do not have state-issued identification of the sort Indiana requires here.[17] Although the AARP

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[16] In addition to being legally erroneous, the Seventh Circuit's rational ignores the fact that elections are frequently decided by a difference of only a few votes. *See* Petition for Writ of Certiorari at 26 n.16.

[17] The Task Force Report accompanying the 2001 Report of the National Commission on Election Reform co-chaired by Presidents Ford and Carter estimated that some "6 to 10 percent of the American electorate does not have official state identification." *To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform,*

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Indiana survey of older registered voters indicated that 3% had no BMV identification, surveys of the elderly population in general disclose that a much higher percentage lacks this form of identification.[18]

As acknowledged by the Seventh Circuit, those "low on the economic ladder" (Pet. App. at 3) are especially prone not to have the required identification. This is not just a problem that is limited to the homeless and displaced. Citizens with lower incomes are less likely to possess photo identification, and minority populations disproportionately lack identification.[19]

Chapter VI-Verification of Identity, p. 4 (2001), http://webstorage3.mcpa.virginia.edu/commissions/comm_2001_taskforce.pdf. *Citizens Without Proof* demonstrates that 11% of United States Citizens, more than 21 million people, do not have government-issued identification.

[18] For example, based on Wisconsin Department of Transportation figures, an estimated 23% of persons aged sixty-five (65) and over do not have either a drivers license or a photo identification. John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, UNIVERSITY OF WISCONSIN-MILWAUKEE EMPLOYMENT AND TRAINING INSTITUTE 1 (June 2005), http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf ("Pawasarat"). The national survey conducted by the Brennan Center discloses that 18% of American citizens age sixty-five (65) or above do not have current government issued photo identification. *Citizens Without Proof* at 3.

[19] *Citizens Without Proof* at 3. In Milwaukee County, Wisconsin, only 47% of African American adults and 43% of Hispanic adults have drivers licenses. Pawasarat at 1.

Persons without valid photo identification must obtain it to vote in-person. As indicated above, obtaining identification may be a difficult process. Persons who do not have birth certificates may obtain them only by expending money and significant time and effort. Some, like Thelma Hunter, do not have official records of their birth at all. Others, like Kristjan Kogerma and other displaced persons, simply do not have the other documentation required by the BMV. The end result, as Ms. Andrews noted, is that 60% of applicants for identification at one BMV license branch are turned away each week because they do not have the underlying documentation necessary to obtain BMV identification. For those who are persistent and attempt to acquire the appropriate documentation and return to the license branch, like Ms. Clemente, there is no guarantee that even repeated trips will reward the determined prospective voter with the elusive prize of identification.[20]

The burdens and hurdles placed in the way of some persons by the voter identification law are therefore significant, involving cost, time, and repeated trips to government agencies. For some the effort and repeated trips may result in the receipt of

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[20] Ms. Clemente's ultimate problem in obtaining identification, that her name on her birth certificate is different than her current name, is also not unique. Only 48% of voting-age women across the United States with ready access to their birth certificates have a birth certificate with their current legal name. *Citizens Without Proof* at 2.

voter identification. For others, identification will continue to be elusive. As Judge Evans, in dissent, noted in the court of appeals, the law "will make it significantly more difficult for some eligible voters . . . to vote. And, this group is mostly comprised of people who are poor, elderly, minorities, disabled or some combination thereof." (Pet. App. at 13). The law imposes a severe restriction on these persons' voting rights and, although their precise numbers are not known, the number is significant.[21]

Another group who will be burdened by the law, and whose numbers certainly cannot be assessed until an election, are those who come to the polls and are not allowed to vote by way of a regular ballot because they simply forgot their identification, or present identification that they believe is valid but is not. The latter category would include persons, for example, who no longer drive and assume that their expired license is valid identification because it contains their name, picture, and current address. Or it could include persons who are carrying other documents they mistakenly believe satisfy Indiana's

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[21] Although the names of all the persons who are burdened by the law are not known, their interests are well-represented by petitioners. The NAACP is advancing the interests of its members who have indicated they are not able to vote because of the new law. The same is true of USA, who has members that do not have birth certificates or current licenses. Representative Crawford is furthering and representing his constituents and potential supporters, a number of whom have indicated that the new law will preclude them from voting.

rigorous requirements. For example, the Washington Post reported that long-time United States Congresswoman Julia Carson of Indianapolis went to her polling place early in the morning on primary day in 2006 to vote and was initially informed by a poll worker that her photo identification card issued by the federal government was not satisfactory because, although it was identified as being issued for the 109th Congress, it had no expiration date. Amy Goldstein, *Democrats Predict Voter ID Problems*, WASHINGTON POST at A1 (Nov. 3, 2006), www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110201897.html. She was allowed to vote only after an off-site supervisor intervened. *Id.*[22]

Furthermore, the challenge process is a hurdle in and of itself. Even when frivolous, some voters will react to a challenge by leaving the polls. Completing the affidavit to vote by way of a provisional ballot can take up to one-half hour and is only the first step in a process that requires the prospective voter to try to get identification and then travel to the appropriate county office to present identification and sign yet

[22] The trial court recognized there would be these potential voters who "through inadvertence will not be able to present photo identification at the polls the day of election." (D.Ct., Pet. App. at 96). "Obviously, the exact identity of voters who will utilize provisional ballots because of their inadvertent lack of photo identification cannot be determined in advanced. As a result, such affected voters also cannot assert their own rights in advance." (*Id.* at 79). These voters are burdened because they will be denied the ability to cast a regular ballot.

another affidavit. Persons without identification who cannot afford a birth certificate may fall within the uncertain definition of indigency and must also vote provisionally. The person cannot sign the indigency affidavit at the polls, but must travel to the appropriate public office to sign the affidavit on a later date.[23] Certainly, having to travel to other offices and fill out forms, in a ten-day window, to make one's vote count in an election that is over, represents a hurdle that many registered voters will choose not to attempt.[24]

In assessing the severity of the restriction on the right to vote – "burdens that are not limited to absolute denial of the right – we should focus on the realities of the situation, not on empty formalism." *Clingman v. Beaver*, 544 U.S. 581, 610 (2005) (Stevens, J., dissenting). The Seventh Circuit assumes that virtually everyone in Indiana and the United States possesses licenses or BMV identification. The reality is, however, that there are residents of Indiana and the United States who do not enter federal

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[23] This assertion of indigency must be done every time the person votes, theoretically two times a year, for both the primary and general election. "This is plainly a cumbersome procedure." *Harman*, 380 U.S. at 542 (concerning the certificate of residence that could be filed in order to be exempt from a poll tax.)

[24] Numerous studies demonstrate that anything that increases the "cost" of voting will discourage some voters and lead to lower voter turnout. *See, e.g.*, Thomas Holbrook and Brianne Heidbreder, *The Etiology of Class Bias in the American States* 7 (2007), http://www.unc.edu/depts/polisci/statepol/conferences/2007/papers/Holbrook%20and%20Heidbreder%20paper.pdf (citing various studies).

buildings or fly in airplanes (Pet. App. at 3), and who do not have all their vital papers with them or easily accessible to them in a safety deposit box. The reality is that the prospect of being challenged and having to make extra trips to government agencies to vote will deter persons from voting. The reality is the voter identification requirements represent a real impediment on the ability to vote for numerous persons in Indiana.

That Indiana's law imposes a "severe" restriction is reinforced by comparing it to other jurisdictions' voter identification requirements. The law at issue in this case is the most draconian in the United States. Only one other state – Georgia, whose recently enacted law is also currently being challenged – imposes an unyielding requirement that all individuals seeking to vote in-person present photo identification.[25] Most other states either require no such proof, provide failsafe alternatives for voters who appear without documentation of their identities, or provide mechanisms for verifying the provisional votes cast by voters lacking the required documents that are far less burdensome than Indiana's.[26]

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[25] *See supra* note 14.

[26] *See supra* notes 14-15; Petition for Certiorari at 16-17. Petitioners do not suggest that these other statutes are necessarily constitutional; they too may well impose severe burdens on the right to vote, and may contain additional requirements that render them just as constitutionally problematic as the Indiana law at issue in this case.

II. The State's supposed interests do not justify this law

This Court's decisions in *Burdick* and *Anderson* direct courts reviewing challenges to laws that burden the right to vote to consider "the *precise* interests put forward by the State as justifications for the burdens imposed by its rule." *Anderson*, 460 U.S. at 789 (emphasis added). The court must also determine the "legitimacy and strength" of these interests. *Id.* Particularly when, as here, the right to vote has been "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (internal citations omitted). In any event, it is not enough for the State merely to articulate plausible interests, for a court "must consider the extent to which those interests make it necessary to burden the plaintiff's rights," *Anderson*, 460 U.S. at 79, and "must also have a 'strong basis in evidence.'" *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (internal citations omitted).

The Seventh Circuit noted the purpose for the identification law was to prevent in-person impersonation voting fraud. (Pet. App. at 6-7). Although combating voting fraud is certainly a compelling governmental interest, *Purcell*, 127 S.Ct. at 7, the State has no interest in combating this particular form of fraud in this instance, given the absence of any evidence that it has ever occurred in Indiana and the absence of any reason to believe that it might occur in the future. Indeed, the record is so bereft of

evidence suggesting any fraud problem and the State's response to any purported problem is so wildly excessive as to give rise to the inference that the voter identification law is not really designed to stamp out fraud.

It is undisputed that there is absolutely no evidence in-person impersonation voting fraud has ever occurred in Indiana. The only documented voting fraud in Indiana has involved absentee balloting, an area the State has chosen not to regulate with any new protections. Although the State and the trial court cited to various newspaper articles and anecdotal reports of voting fraud outside of Indiana, most do not specifically concern in-person impersonation fraud[27] and actual studies disclose scant evidence of voting fraud in general, and in-person impersonation fraud in particular. As indicated previously, "the disenfranchisement of voters through antiquated voting systems, errors, mismanagement of registration bases, and intimidation or harassment is a far bigger problem than traditional forms of election fraud." Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* 15 (2003). (R.Doc. 82, Att. 3, Ex. 6).

Cases from other jurisdictions challenging voter identification laws also illustrate that the proponents of voter identification requirements, although claiming fraud as a justification, have been unable to

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[27] *See supra* note 10.

present evidence of in-person impersonation fraud that would be remedied by the challenged laws. *See ACLU of New Mexico v. Santillanes*, 2007 WL 782167 at *33 (D.N.M. 2007), *appeal pending*, No. 07-02057 (10th Cir.) (Defendant presented "no admissible evidence that the October 2005 City Charter amendment actually serves to combat an existing problem with voter impersonation fraud in municipal elections."); *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1361 (N.D. Ga. 2006) ("Indeed, Secretary of State Cox pointed out that, to her knowledge, the State had not experienced one complaint of in-person fraudulent voting during her tenure."); *Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. 2006) ("The Photo-ID Requirement could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri.")

By contrast, the Seventh Circuit panel's majority advanced the perverse hypothesis that the very lack of reported evidence in fact proves the existence of a problem: the fact that there were no verified instances of illegal impersonation simply suggested that such lawbreaking was occurring undetected. (*See* Pet. App. at 8-9.) As this Court has observed in a related context, "[t]his 'heads I win, tails you lose' approach cannot be correct." *FEC v. Wisconsin Right To Life*, ___ U.S. ___, 127 S.Ct. 2652, 2668 (2007). If the *Burdick/Anderson* test is to have any meaning, sheer imaginative speculation cannot take the place of tangible, evidence. Indeed, in a variety of contexts related to regulation of the political process, this

Court has repeatedly demanded more than a blanket assertion of an anti-fraud rationale. Perhaps the most analogous example involves the Tennessee durational residency requirement at issue in *Dunn v. Blumstein*. There, the state argued that its law was necessary to combat potential fraud, but this Court found that claim "unconvincing," 405 U.S. at 346, in light of the state's inability to summon any evidence.[28]

This Court's recent campaign finance decisions have followed the same approach. For example, in *Randall v. Sorrell*, ___ U.S. ___, 126 S.Ct. 2479, 2494 (2006) (plurality opinion), this Court refused to accept on faith Vermont's argument that its contribution limits were necessary to prevent corruption and the appearance of corruption, instead emphasizing that a reviewing court "must examine the record independently and carefully to determine whether . . . [the] contribution limits are 'closely drawn' to match the State's interests." Similarly, in *McConnell v. FEC*, 540 U.S. 93, 232 (2003), this Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 that prohibited campaign contributions by persons

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[28] In a later case, *Marston v. Lewis*, 410 U.S. 679 (1973) (*per curiam*), the Court accepted a far less restrictive 50-day voter registration cutoff imposed by Arizona in light of the state's evidence that the cutoff was "necessary to permit preparation of accurate voter lists." *Id.* at 681. The contrast between *Dunn* and *Marston* illustrates the point that even when prevention of vote fraud is a compelling interest, the means for combating it must be narrowly tailored to avoid imposing an unnecessary barrier to the right to vote.

under the age of seventeen, because the intermediate scrutiny demanded of regulations concerning campaign contributions was not satisfied by the government's "scant evidence" that such a regulation served the interest of protecting against fraudulent adult contributions in the name of their children. And, even where the Court upheld another portion of the law restricting large contributions to party committees on an anti-corruption rationale, it emphasized that the statutes were supported by an "ample record" and not just by "common sense." *Id.* at 145.

Still other cases involving access to the political process are also in accord. Across the board, this Court has required that actual facts support a State's action that burdens political rights. In both *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 204-05 (1999), and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995), this Court rejected states' arguments that their generalized interest in preventing electoral fraud justified restrictions on initiative circulators (*Buckley*) or on anonymous pamphleteering (*McIntyre*). This general interest was not sufficient to overcome the constitutional rights in question. And in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 228-29 (1989), this Court rejected California's assertion that statutory restrictions banning primary endorsements and regulating the internal affairs of party committees were necessary to protect primary

voters from confusion and undue influence given the lack of evidentiary support.[29]

The need to closely inspect and determine the legitimacy and strength of the asserted interests is particularly acute here. The history of voting in the United States is replete with examples of sinister efforts to disfranchise voters which were accepted by courts that refused to look behind the assertion of an innocent purpose. Accordingly, "applying heightened scrutiny helps to ensure that . . . limitations are truly justified and that the State's asserted interests are

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[29] Even beyond the political process, this Court has refused in cases that call for anything more than the most deferential form of rationality review to allow a state's bare and unsupported assertion of fraud prevention to justify governmental action. In *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), for example, where the Court applied "intermediate scrutiny" to assess a ban imposed by a Florida's Board of Accountancy on in-person solicitation by certified public accountants and found it to be unconstitutional, this Court rejected the claim that the ban was necessary to protect consumers from fraud because although "the Board's asserted interests are substantial, the Board has failed to demonstrate that its solicitation ban advances those interests." *See also, e.g., Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 165, 169 (2002) (village's desire to prevent fraud did not justify regulation of solicitation given "an absence of any evidence of a special crime problem related to door-to-door solicitation in the record"); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 636 (1980) (fraud justification for ordinance prohibiting solicitation by certain charities was not justified by village's desire to protect citizens from fraud); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 268 (1974) (fraud concerns did not justify durational limitations on receipt of assistance).

not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman*, 544 U.S. at 603 (O'Connor, J., concurring in part and concurring in the judgment). In *Breedlove v. Suttles*, 302 U.S. 277, 283-84 (1937), the Court upheld Georgia's poll tax as a good government measure, "a familiar and reasonable regulation long enforced in many states." There is no dispute, however, that the poll tax was adopted as one of the "expedients to obstruct the exercise of the franchise by the negro race." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). Ultimately, even without finding unconstitutional purposeful racial discrimination, this Court overruled *Breedlove* in *Harper*. Similarly, in *Lassiter v. Northhampton County Board of Elections*, 360 U.S. 45, 51, 54 (1959), this Court upheld North Carolina's literacy test for voting as "designed to promote intelligent use of the ballot" and as advancing "the desire of North Carolina to raise the standards for people of all races who cast the ballot." Less than a decade later, in *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966), this Court recognized that literacy tests "have been instituted with the purpose of disenfranchising Negroes."

It is true that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively," *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986), and that states have an interest in taking measures to ensure public confidence in elections. However, these realities simply do not allow a

state to impose, as Indiana has done here, a significant burden on the fundamental right to vote as a "solution" to a problem – in-person impersonation voting fraud – that does not exist and cannot be rationally feared given the general lack of evidence concerning the existence of such fraud. In *Burdick*, Justice Kennedy's dissent explained that he would have struck down Hawaii's ban on write-in voting because "[t]he interests proffered by the State, some of which are puzzling, are not advanced to any significant degree by the" ban. *Burdick*, 504 U.S. at 448 (Kennedy, J., dissenting). Indiana's explanations are worse than "puzzling": they are quite simply inadequate. Indeed, the lack of evidence of in-person fraud compounded by the burden imposed on registered voters means that "the State has failed to justify" the voter identification law "under any level of scrutiny." *Id.*

Nor can the State argue that the voter identification law is supported by a strong interest in preventing "the eroding of the public confidence in the electoral process through the appearance of corruption." *FEC v. National Right to Work Committee*, 459 U.S. 197, 208 (1982). While this is certainly an important interest, *Purcell*, 127 S.Ct. at 7; *Buckley v. Valeo*, 424 U.S. 1, 27 (1976), the State cannot be allowed to create an opinion about the public's subjective perceptions when there is no evidence to support this perception. As the Missouri Supreme Court stated in *Weinschenk*, 203 S.W.3d at 218, in striking down a

voter identification statute on state constitutional grounds:

> While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.

Moreover, it would be an intolerable irony, and unconstitutional, to shore up voter confidence by disfranchising part of the electorate.

III. The voter identification law is not narrowly drawn to meet any legitimate goal of fighting impersonation voting fraud

Without any evidence of in-person voting fraud or any reasonable basis to suspect that such fraud is a risk in Indiana, the voter identification law simply cannot be deemed to be narrowly drawn to meet the State's avowed fraud concerns. Even were there some basis in evidence for the restriction, "[a] State . . . is constrained in how it may pursue that end: '[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Shaw*, 517 U.S. at 908 (internal citations omitted). The voter identification law, the means chosen by the State to attack the

perceived risk of in-person identification fraud, is not so tailored. "[T]here are other, reasonable ways to achieve" the State's "goals with a lesser burden on constitutionally protected activity." *Dunn*, 405 U.S. at 343. Here the State has chosen a remedy which is most burdensome, ignoring "other, reasonable ways to achieve" its goals.

In *Dunn*, in striking down the challenged durational residency requirement, this Court noted that the State's interests in safeguarding against fraud were met by the "variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." 405 U.S. at 353. Similarly, in *Harman*, in invalidating Virginia's poll tax, the Court noted the "availability of numerous devices to enforce valid residence requirements – such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, [and] public scrutiny by candidates and other interested parties." 380 U.S. at 542.

The same principle holds true here. Prior to 2005, Indiana combated the risk of in-person voter impersonation by requiring that persons presenting themselves at the polls sign in, thereby allowing for a signature comparison. All this was done under the watchful eyes of numerous election officials who could challenge the prospective voter, and against the backdrop of extensive criminal statutes punishing fraud in voting. Given that there has been absolutely no evidence of in-person fraud in Indiana, the voter identification law is simply not "necessary to meet the

State's goal of stopping fraud." *Dunn*, 405 U.S. at 353.[30]

The State cannot argue that further protections are necessary because of the alleged inadequacy of signature identification as an anti-fraud mechanism. After all, it chose to retain signature identification as the sole method of fraud prevention in absentee voting, despite the fact that the only evidence of voting fraud in Indiana is in absentee voting. The Indiana Supreme Court has stated the "absentee voter is not exposed to the extensive precautions followed by Election Day officials to guard the integrity of the ballots." *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006). Abandoning these extensive precautions while allowing lesser precautions to

[30] Contrary to the lower courts' unsupported assertions concerning the difficulty in detecting in-person voter impersonation (D.Ct., Pet. App. 7-8, 109), according to the Director of the Election Crimes Branch and Senior Counsel for Policy, both of the Public Integrity Section of the Justice Department, election crime prosecutions present an easier means of obtaining convictions than do other forms of public corruption because "[e]lection crimes usually occur largely in public," "[e]lection crimes often involve many players," and "[e]lection crimes tend to leave paper trails." CRAIG C. DONSANTO AND NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION CRIMES 2 (7th ed. 2007), http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf. They note further that the most common election frauds are those involving absentee ballots and "ballot-box stuffing" which necessarily involve poll official involvement. *Id.* at 101-03.

continue to exist with regard to absentee ballots cannot be described as narrowly tailored.[31]

To the extent the State has portrayed itself as susceptible to in-person voter identification fraud because of bloated voter rolls (D.Ct., Pet. App. at 109), the tailored remedy for this problem lies within the State's own control: to maintain appropriate voter lists. Indeed, subsequent to the district court's decision, Indiana was sued by the United States for failing to properly maintain voter rolls and entered into a consent judgment both admitting fault and agreeing to comply with the requirements of the National Voter Registration Act of 1993 to properly maintain voter registration lists. (J.A. at 299-306). The State has ignored this narrowly tailored approach.

Moreover, Indiana's adoption of a distinctively draconian voter identification regime further undercuts its claim of appropriate tailoring. The State has

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[31] The Seventh Circuit's comment that voter identification would not be possible with regard to absentee balloting is simply untrue (Pet. App. at 10). Of course, one of the identification methods provided to absentee voters under HAVA is submission of copies of photo identification. 42 U.S.C. § 15483(b)(2). However, the Seventh Circuit missed the point. The argument is not that the identification methods must be the same between the two types of balloting. The point is that Indiana cannot claim that signature identification and the other anti-fraud mechanisms inherent in personally appearing at the polls are inadequate when it has determined that signature identification is adequate to detect fraud in absentee voting.

adopted a regulation that, because it requires a specific form of identification, goes far beyond a mere requirement that prospective voters satisfy election officials as to their identity.[32] The experience of Indiana's sister states that do require voters to identify themselves, but allow for a host of forms of identification aside from drivers licenses or state-issued identification cards, demonstrates there are less onerous methods to achieve the goal of voter identification.[33] Indiana recognizes this by allowing persons who live in nursing homes that are also polling places to vote in-person without identification. The district court explained this exception by noting that for members of this "particularly disadvantaged" group, "sufficiently reliable methods of verifying their identification otherwise exist." (D.Ct., Pet. App. at 123). But this concedes that, particularly for disadvantaged groups, less burdensome methods of identification are appropriate.

It is true the law allows an indigent voter without identification to sign an affidavit if he or she is unable to pay the fee, and allows a voter who has a religious objection to being photographed to also sign an affidavit. IND. CODE § 3-11.7-5-2.5(c). However, this is hardly less burdensome. The affidavits are not

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[32] It is difficult to believe that when Congresswoman Carson, *see supra* entered her polling place to vote she was not immediately identified by every poll worker there.

[33] *See supra* notes 14-15 and Petition for Certiorari at 15-17 n.6-8.

available at the polls for immediate signature and relatively easy voting. Rather, the prospective voter must go through the challenge process, execute an affidavit concerning the provisional ballot, execute the provisional ballot, and then go to a remote government office at a later time to sign yet another affidavit. This is not tailored in any way to combat the State's asserted interests.

This lack of tailoring is not excused by the availability in Indiana of absentee balloting for persons who do not have identification. First, as is clear from Indiana law, IND. CODE § 3-11-10-24, for much of the potential electorate there is no absolute right to vote by absentee ballot in Indiana. Second, absentee balloting is simply not the equivalent of voting in-person. "[B]ecause absentee voters vote before election day, often weeks before . . . they are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

The "precise interests," *Anderson*, 460 U.S. at 789, put forward by Indiana do not make it necessary to burden voting rights with the voter identification statute. Even if the fraud concern was legitimate, the State's interests could be satisfied by far less restrictive regulations. The statute is not narrowly drawn to meet the articulated state interest and is unconstitutional.

Indeed, even if this Court were to conclude that, under *Burdick*'s "flexible" standard "the character and magnitude" of the burden Indiana's law imposes, 405 U.S. at 434, falls short of requiring the most searching degree of scrutiny, the Indiana statute would nonetheless be unconstitutional. It is at best only tangentially related to "those interests [that] make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. In this case, the State has failed to justify the law "under any level of scrutiny" applicable to electoral restrictions, *Burdick*, 504 U.S. at 448 (Kennedy, J., dissenting).

Indiana's explanations fall far under the "puzzling" bar that Justice Kennedy erected in *Burdick*, *id.*; they are inadequate at best and pretextual at worst. The State has failed to explain why it has chosen to impose new and significant burdens on in-person voting to fight a non-existent problem of fraud while explicitly choosing not to impose any burdens on absentee balloting where the risk of fraud is demonstrably more substantial. It has failed to explain why signature comparison and detailed criminal provisions are adequate to prevent absentee vote fraud but not to prevent in-person vote fraud. It has failed to explain why Indiana requires more onerous identification requirements than any other state in the Nation. And it has failed to explain why indigent individuals and religious objectors must travel to election headquarters after each election in which they want to participate rather than receiving permanent exemptions or being permitted to file their

affidavits at their polling places. These are all "danger signs" of a constitutionally impermissible regime, *Sorrell*, 126 S.Ct. at 2492, that require rigorous judicial scrutiny. Under any scrutiny, the identification law is not tailored at all to meet the fraud concerns expressed by the State.

CONCLUSION

The judgment of the court of appeals should be reversed.

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REGUI ATORY APPENDIX

IND. ADMIN. CODE tit. 140, r. 7-4-3:

(a) As provided by 140 IAC 7-4-2 *[section 2 of this rule]*, the bureau shall require the documents listed in subsections (b) through (e) as part of the application for an Indiana driver's license, learner/driver education permit, and identification card. Only original documents or certified facsimiles from the issuing agency will be accepted. The bureau reserves the right to refuse any identification presented that appears fraudulent or unreliable. Altered and expired documents will not be accepted. Documents presented to the bureau for identification purposes will be kept confidential. All documents must contain the applicant's name and must be in the English language or be presented with an English translation of the document. The commissioner or the commissioner's designee may accept reasonable alternate documents to satisfy the requirements of this rule and IC 9.

(b) Primary documents-acceptable United States documents are as follows:

(1) United States birth certificate with authenticating stamp or seal containing the applicant's date of birth, place of birth, and parent's names, issued by:

(A) county department or county board of health from the applicant's state of birth;

(B) a state department or state board of health from the applicant's state of birth; or

(C) a verified delayed birth certificate.

(2) Certificate of naturalization/citizenship.

(3) Certification of report of birth (form DS-1350 issued by the United States Department of State).

(4) U.S. consular report of birth (form FS-240 issued by the United States Department of State).

(5) Birth certificates issued by United States territories, including American Samoa, Guam, Puerto Rico, and Virgin Islands.

(6) U.S. military or merchant marine identification card with photo.

(7) U.S. passport.

(8) U.S. veterans universal access identification card with photo.

(9) Indiana driver's license or learner/driver education permit.

(c) Primary documents-acceptable immigration documents are as follows:

(1) Valid foreign passport with photo with a visa that includes a valid form I-94 indicating the authorized duration of stay in the United States.

(2) Valid foreign passport with a current visa that states "Upon Endorsement serves as Temporary I-551 evidencing Permanent Residence for 1-year" issued by the United States Department of Homeland Security.

(A) Canadian passports are not required to have a visa or a form I-94.

(B) Applicants from the Federated States of Micronesia, Palau, and the Republic of the Marshall Islands are not required to present a visa but must submit a form I-94.

(C) Passports with I-94 (issued by the United States Customs and Border Control or United States Citizenship and Immigration Services) indicating F-1/F-2 status must present a valid form I-20 ("Certificate of Eligibility" issued by the United States Immigration and Customs Enforcement). For these applicants, the form I-20 serves as a secondary document.

(D) Passports with I-94 indicating J-1/J-2 status must be submitted with a valid form DS-2019 ("Certificate of Eligibility" issued by the United States Department of State). For these applicants, the form DS-2019 serves as a secondary document.

(3) Authorization for parole of an alien into the United States (form I-512 issued by United States Citizenship and Immigration Services).

(4) Employment authorization card (I-688B issued by United States Immigration and Naturalization Services).

(5) Employment authorization card (I-766 issued by United States Immigration and Naturalization Services).

(6) Form I-94 stamped with "Section 207" refugee status.

(7) Form I-94 stamped with "Section 208" asylum status.

(8) Permanent resident card (I-551).

(9) Temporary I-551 stamp on a passport.

(10) Temporary resident card (I-688 issued by United States Immigration and Naturalization Services).

(11) Travel document (I-131 issued by United States Immigration and Naturalization Services).

(12) An I-797 "Notice of Action" (issued by United States Citizenship and Immigration Services) indicating an applicant's approval may be used to extend the validity of an original primary document.

(d) Secondary documents-acceptable documents are as follows:

(1) Certified academic transcripts from schools in the United States or its territories.

(2) School report cards from schools in the United States or its territories dated within twelve (12) months of application.

(3) School identification card with photo or yearbook photo from schools in the United States and/or its territories dated within three (3) years of application.

(4) An identification card with photo issued by a foreign consulate.

(5) An identification card with photo issued by the federal government.

(6) An Indiana identification card.

(7) Driver's license, identification card, or permit with photo issued by another state.

(8) Original driving record from another state.

(9) Valid form I-20 with a valid form I-94 and an F-1/F-2 status in passport.

(10) Valid form DS-2019 (issued by the United States Department of State) with a valid form I-94 and a J-1/J-2 status in passport.

(11) Indiana county presentence investigation report with clerk stamp or seal.

(12) Indiana gun permit.

(13) Indiana probation identification card with photo, name, and date of birth.

(14) Letter from probation officer, caseworker, or social worker on official letterhead, certified with stamp or seal, with the applicant's name and signature of the probation officer, caseworker, or social worker.

(15) Prison release documentation.

(16) U.S. district court presentence investigation report with stamp or seal.

(17) Valid banking card or MasterCard, Visa, American Express, or Discover card issued in the name of the applicant with his or her signature.

(18) Bank statement issued within sixty (60) days of application.

(19) Form W-2 (federal or state) or Form 1099 with the applicant's name and address.

(20) Computer-generated paycheck stub with applicant's name and address.

(21) Valid employee identification card with photo.

(22) Valid Indiana professional license.

(23) Valid insurance card.

(24) Medicare or Medicaid card.

(25) U.S. military discharge or DD214 separation papers.

(26) U.S. Uniformed Services Card.

(27) Divorce decree certified by court of law with stamp or seal.

(28) Application of marriage or record of marriage that is certified with stamp or seal.

(29) Applicants under eighteen (18) years of age making application for an Indiana identification card

may present acceptable Social Security documentation as a secondary document.

(e) Any document from the list in the primary or secondary group, or any of the documents listed below, may be used as proof of Indiana residency as long as the document contains the applicant's name and current residential address. A post office box is not an acceptable residential address.

(1) Child support check stub from the Indiana family and social services administration with name and address of the applicant.

(2) Change of address confirmation (form CNL107) from the U.S. Postal Service listing the applicant's old and new address.

(3) Bill or benefit statement issued within sixty (60) days of application.

(4) Indiana driver's license, identification card, or permit with photo.

(5) Survey of the applicant's Indiana property produced by a licensed surveyor.

(6) Affidavit of Indiana residency.

(7) Voter registration card.

(8) Valid Indiana vehicle or watercraft title or registration.

(f) Under IC 9-24-9-2, each application for a license or permit must require a Social Security number.

Acceptable documents to verify an applicant's Social Security number are the following:

(1) Social Security card.

(2) Social Security card bearing the legend "Valid for Work Only with DHS Authorization".

(3) Social Security card bearing the legend "Not Valid for Employment".

(4) Letter verifying the applicant's Social Security number issued in the applicant's name and signed and stamped by the Social Security Administration.

(5) Numident report stamped and issued in the applicant's name by the Social Security Administration.

RESPONDENT'S BRIEF

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Nos. 07-21, 07-25

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,

Petitioners,

v.

TODD ROKITA, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT MARION COUNTY ELECTION BOARD

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QUESTION PRESENTED

When Indiana's Voter Identification Statute precludes some otherwise-qualified persons from voting and there is little or no evidence showing the in-person voter impersonation fraud the statute is designed to prevent, what standard should this Court apply in evaluating the constitutionality of the statute?

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Under Supreme Court Rule 24.2, the Marion County Election Board is satisfied with the presentation by the Petitioners in No. 07-21 of those portions of their brief required by Supreme Court Rule 24.1(b), (d), (e), and (f) and, therefore, the Marion County Election Board does not include those items in this brief.

In this brief, the Election Board takes no position on the constitutionality of the Voter Identification Statute.[1] Rather, the Election Board provides factual information about elections in Marion County, the most populous and most diverse county in Indiana, and presents its position regarding the standard of review this Court should use in evaluating the Voter Identification Statute.

STATEMENT

In 2005, the Indiana General Assembly enacted, and the Governor signed into law, a statute referred to in this brief as the Voter Identification Statute, Public Law No. 109-2005, codified in several sections of the Indiana Code including Sections 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1, and 3-11.7-5-2.5.[2] These provisions

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[1] Under Indiana law, an inferior political body such as the Election Board lacks authority to argue that a state statute is unconstitutional - and the Election Board makes no argument regarding constitutionality here. *Bd. of Comm'rs of Howard County v. Kokomo City Plan Comm'n*, 263 Ind. 282, 330 N.E.2d 92, 100 (1975).

[2] All citations to the Indiana Code have been verified using the version available on Westlaw as of November 30, 2007.

require an individual who is otherwise qualified to vote in Indiana to provide at the polls on election day a current form of government-issued identification, bearing a photograph and expiration date, in order to be allowed to vote.

The constitutionality of the statute is challenged in this litigation, which consolidates two separate lawsuits that were filed in the United States District Court for the Southern District of Indiana. The Marion County Election Board was a defendant in each of those cases. The parties challenging the statute's constitutionality have argued that it is difficult or impossible for some individuals to obtain identification meeting the statutory requirements, depriving those individuals of their right to vote.

The State of Indiana has defended the statute's constitutionality, arguing that the purpose of the statute is to protect against in-person voter impersonation fraud. The State also has challenged various plaintiffs' standing to bring the lawsuit. The Marion County Election Board briefed the issue of standing in the Court of Appeals, but that issue is being briefed by the State in this Court.

The district court ruled that some of the plaintiffs had standing and that the statute did not unconstitutionally burden the right to vote. Pet. App. at 96-117. The Seventh Circuit affirmed by a 2-1 vote, holding that at least the Indiana Democratic Party had standing and that the statute did not unconstitutionally burden the right to vote. Pet. App. at 4, 10. The Seventh Circuit denied rehearing *en*

banc, with four judges joining an opinion dissenting from denial of rehearing *en banc*. Pet. App. at 150-55.

The Marion County Election Board

The Marion County Election Board is established to conduct all elections and administer election laws in Marion County, Indiana. Ind. Code § 3-6-5-14(a)(2). The Election Board is bi-partisan in its construction, consisting of the elected County Clerk and two additional members, one nominated by each major political party. Ind. Code §§ 3-6-5-2, 3-6-5-5.

The Election Board's objective is to administer open, fair and fully-participatory elections without favoring any political party. The ideal result for the Election Board is an election with 100% voter participation. The ability of the Election Board to reach that ideal result suffers from any restriction unnecessarily reducing voter participation.

To foster voter participation and increase voter turnout, the Election Board seeks to increase the ease, openness, and accessibility of elections. A principal method to do so is by locating polling places conveniently to encourage neighborhood voting. Indiana law requires county executives to locate a polling place for a particular precinct within five miles from the closest boundary of the precinct, and each precinct can contain no more than 1,200 active voters at the time the precinct is established, with some exceptions. Ind. Code §§ 3-11-8-3(b); 3-11-1.5-3. Moreover, polling places are in locations accessible to persons with disabilities. Ind. Code § 3-11-8-6. By establishing most polling places in locations even more

convenient than the statutory minimum, Marion County has provided for neighborhood voting, a voting experience that is not crowded and that is close to a voter's home.

The Election Board additionally makes elections accessible by providing advance information about voting and polling places. Voters may obtain the location of their polling place on-line through the Election Board's website. Other information for voters is available on that website. The Election Board also strives to deliver friendly and helpful customer service to voters who telephone for election information.

The Election Board further supports its efforts to establish easy and open elections in its recruiting and training of poll workers. In Marion County, thousands of individuals volunteer to work at the polls at Marion County's 914 voting precincts each election day (the major political parties and the Election Board are unable to fill some of the 4,570 positions). The Election Board provides extensive training to these poll workers including hands-on training on setting up and operating the polls and voting machines. Election workers also are trained on counting absentee ballots (which are collected centrally and distributed to precincts for counting), counting in-person ballots, closing the polls, dealing with forms for voter name or address changes, and administering the requirements of the Voter Identification Statute.[3]

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[3] For example, the training PowerPoint for poll inspectors, which consists of more than 80 slides, may be found at http://www.indygov.org/NR/rdonlyres/DF7538EC-7424-4928-A965-

Accessibility is further enhanced by the operation of two sets of voting machines in each polling place. Most voters use an optical-scan machine that requires the voter to mark a paper "ballot card," which is machine-counted and retains a paper record. Primarily for voters with disabilities, each polling place also is equipped with at least one touchscreen machine, which allows any voter (including visually impaired voters, to whom the ballot is presented audibly on headphones) to vote unassisted in private.

To enhance convenience, the Election Board administers in-person voting at a central location in downtown Indianapolis for thirty days before election day, including some weekend days. Ind. Code § 3-11-10-26. Qualified voters may vote by absentee ballot by mail within ninety days of the election. Ind. Code § 3-11-4-3. The Election Board also administers traveling boards, which go to voters' homes upon voters' request to allow absentee balloting before election day. Ind. Code § 3-11-10-25.

CE6A72BBFF5E/0/inspectortraininggen07student.ppt (last visited Nov. 29, 2007). Other training materials are available at http://www.indygov.org/NR/rdonlyres/B60DF988-48DD-446E-B7AD-420FAB31E07E/0/2007PollInspectorAcademyTrainingMaterials.doc (last visited Nov. 29, 2007). The Election Board provides additional training materials for other poll workers, including clerks and judges.

Time-tested systems were in place to detect in-person voter impersonation fraud before the challenged statute was enacted

Before enactment of the statute challenged in this action, Indiana had in place several layers of protection against in-person voter impersonation fraud.

On election day, each precinct is administered by a precinct election board made up of an inspector and two judges, one from each major party; the law also calls for two clerks, one from each major party. Ind. Code §§ 3-6-6-1, 3-6-6-2. In many precincts, the precinct election board is made up of precinct residents, who often have worked at the polls for several years and know personally many of the voters of the precinct. This arrangement helps to protect against in-person voter impersonation fraud because precinct workers may recognize an imposter, and precinct election workers have the authority to challenge persons appearing to vote if the election board member "is not satisfied that a person who offers to vote is the person who the person represents the person to be." Ind. Code § 3-11-8-27.

Further, Indiana law allows each political party to appoint challengers, who may be inside polling places during elections. Ind. Code §§ 3-6-7-1, 3-6-7-5. A challenger may challenge any person appearing to vote whom the challenger believes is "not a legal voter in the precinct." Ind. Code § 3-11-8-21(3). These challenges could include situations in which the challenger believes the person is an imposter or is not qualified to vote by residence or for some other reason.

Some challenges may be resolved by the precinct election board or by an affidavit executed by the person appearing to vote, and those that cannot require the voter to vote by provisional ballot. *See* Ind. Code §§ 3-11-8-22.1, 3-11-8-23, 3-11-8-23.5.

Each precinct is provided with a poll book, which each person appearing to vote must sign. The poll book includes a photocopy of the registered voter's signature. *See* Ind. Code § 3-7-29-4. "In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration or any certified copy of the signature provided under Ind. Code § 3-7-29. If the board determines that the voter's signature is authentic, the voter may then vote." Ind. Code § 3-11-8-25.1(i). When the signatures do not match, the voter is subject to challenge.

This same signature verification process – comparing the voter's signature to a signature already on file – is the sole means to verify a mail-in absentee voter's identity under Indiana law. Ind. Code § 3-11-10-4. An absentee voter who votes by mail is not required to provide any additional identification. Ind. Code § 3-11-10-1.2.

Moreover, it is a felony for a person to vote – or even to present himself for voting – when a person is not registered or otherwise authorized to vote. Ind. Code § 3-14-2-9. More specifically, it is a felony to "vote[] or make[] application to vote in an election in a name other than the person's own." Ind. Code § 3-14-2-12(1). These crimes are punishable by incarceration

from six months to three years and a fine of up to $10,000. Ind. Code § 35-50-2-7.

Election accessibility under the Voter Identification Statute

As explained below, the Voter Identification Statute at issue in this case has precluded certain otherwise-qualified individuals from voting. Petitioners in No. 07-21 have identified certain otherwise-qualified individuals who are unable to obtain identification sufficient to satisfy the statute, and who therefore cannot vote. *Br. for Pets.* at 41. *Amici* have identified others who, although otherwise qualified, are or may be unable to vote as a result of the challenged Voter Identification Statute. *E.g., Br. of League of Women Voters of Ind.* (examples from Indiana); *Br. of Current and Former Secs. of State* at 12 (examples from other states).

Provisional ballots were not counted in the 2007 municipal election because of the Voter Identification Statute

In the 2007 municipal election, some votes of otherwise-eligible individuals were not counted because they did not comply with the Voter Identification Statute. The Election Board can verify that at least thirty-four persons arrived at the polls and presented themselves for voting without appropriate photo identification (others may have done so without making a record through the provisional balloting process). As required by statute, each of the thirty-four filled out and signed provisional ballot paperwork, then cast a provisional ballot that was not

counted, but rather was sealed and sent to the Election Board for further review. Of the thirty-four provisional ballots cast, only two voters followed up by bringing their compliant identification to the County Clerk's Office so that their provisional ballots would be counted. The other thirty-two did not bring compliant identification to the Clerk's Office within the time period designated by statute, and their votes therefore were not counted. *See* Ind. Code § 3-11.7-5-2.5.

All thirty-four individuals appeared at the polling place for the precinct in which they were registered. All signatures appearing on their provisional ballot envelopes matched the poll book signatures.[4] Two of those whose votes were not counted had voted in fifteen previous elections at their precincts. Six others had voted in fourteen elections at their precincts. Four others had voted in thirteen prior elections at their precincts. One had voted in twelve elections at her precinct, and another had voted in ten elections at her precinct. Only six had no history of voting in a Marion County election, and the remaining persons had voted a handful of times at the precinct where they were registered and appeared on November 6, 2007.

No evidence of in-person voter impersonation fraud

The Election Board views the Voter Identification Statute in the context of its experience administering elections in Indiana's most diverse and most populous

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[4] One provisional ballot envelope was unsigned by the individual seeking to vote.

county. The Marion County Election Board has neither any memory nor any record of any instance of the in-person voter impersonation fraud the Voter Identification Statute is designed to combat.

SUMMARY OF ARGUMENT

Before enactment of the Voter Identification Law, multiple protections were in place to prevent in-person voter impersonation fraud, and they remain today. These include local election boards, voter challenge processes, poll books allowing comparison of a voter's prior signature with the signature of the person presenting himself to vote, and criminal laws making voter impersonation a felony.

As shown in this brief and the briefs of Petitioners and *amici*, the Voter Identification Statute not only has precluded some individuals from voting (as the Seventh Circuit concluded), it also undermines the accessibility of the election process by promoting the idea that voting is difficult. Some persons who sought to vote in the 2007 municipal election did not have their votes counted because they did not have proper identification, including fourteen individuals who had previously voted in-person ten or more times at the same polling places where they were not permitted to vote in 2007.

The Marion County Election Board has no record and no knowledge that the in-person voter impersonation fraud the Voter Identification Statute is designed to address has previously occurred in Marion County.

The magnitude of the interest affected by the Voter Identification Statute and the lack of evidence of the problem it is designed to prevent dictate that this Court should examine the law with close scrutiny.

ARGUMENT

Because the right to vote is vitally important and the evidence of in-person voter impersonation fraud is sparse, the Court should closely scrutinize the statute.

The test under which the constitutionality of Indiana's Voter Identification Statute should be analyzed appears in *Burdick v. Takushi*:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

504 U.S. 428, 434 (1992), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

In this case, the injury is the denial of the right to vote to individuals who, for whatever reason, are unable to obtain qualifying photographic identification as required by Indiana statute. The right of suffrage

is very justly regarded as a fundamental article of republican government. *The Federalist* No. 52, at 354 (James Madison) (Jacob E. Cooke, ed., 1961). This Court has noted that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Thus, the character of the alleged injury is of the highest importance, although the magnitude of its denial has not yet been fully quantified.

The Court of Appeals wrongly diminished this interest, stating that "[t]he benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote) . . . ."[5] Pet. App. 3 (emphasis in original). This view overlooks the value of voting to the individual voter, who participates in selecting those who represent the voter, and to society as a whole, because citizens' trust in government rests in part on their participation in its processes. As Judge Wood wrote (on behalf of three other judges) in her dissent from denial of rehearing en banc, "as a

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[5] Some elections are decided by one vote. This item appeared in the *Richmond (Ind.) Palladium-Item* on November 10, 2007: "WINCHESTER, Ind. – Bill Monroe lost by one vote in his bid to return to the Winchester City Council. And here's the clincher to the squeaker of a race: His wife didn't vote. If Kathie Monroe had indeed voted Tuesday, her husband, a Democrat who previously served two terms on the council, would have tied with Republican opponent Tom Sells, a political newcomer." http://www.pal-item.com/apps/pbcs.dll/article?AID=/20071110/NEWS01/711100314/1008 (last visited Nov. 29, 2007).

matter of law the Supreme Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters." Pet. App. 154.

While each individual's right to vote is fundamental, *see Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Voter Identification Statute also undermines the overall atmosphere of open, accessible elections that the Marion County Election Board and Indiana law otherwise try to promote. The Voter Identification Statute, and the publicity surrounding it, encourage the notion that voting is difficult. That idea in itself is likely to depress voter turnout.

When voting rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). In contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434, quoting *Anderson*, 460 U.S. at 788. "[A]s a general matter, 'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (parentheses in original).

Because Indiana's Voter Identification Law has deprived some otherwise-qualified persons from exercising their right to vote (as the Seventh Circuit majority concluded), and because there has been no

showing of in-person voter impersonation fraud (as the State concedes), this Court should apply close scrutiny to the statute.

CONCLUSION

The Court should apply close scrutiny in its evaluation of Indiana's Voter Identification Statute.

Respectfully submitted,

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RESPONDENT'S BRIEF

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TODD ROKITA, *et al.*,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person show government-issued photo identification violates the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS

In No. 07-21, Petitioners include State Representative William Crawford (D-Indianapolis) and Township Trustee Joseph Simpson (D-Indianapolis), along with several non-profit political-interest groups, including United Senior Action of Indiana, Indianapolis Resource Center for Independent Living ("IRCIL"), Concerned Clergy of Indianapolis ("CCI"), Indiana Coalition on Housing and Homeless Issues (joined in the Petition, but has now withdrawn from the case), and the Indianapolis Branch of the NAACP. The Respondents are the defendant Marion County Election Board ("MCEB") and intervenor-defendant the State of Indiana.

In No. 07-25, Petitioners are the Indiana Democratic Party and the Marion County Democratic Central Committee ("MCDCC"). Respondents are Indiana Secretary of State Todd Rokita, Indiana Election Division Co-Directors J. Bradley King and Pamela Potesta, and the MCEB.

This brief is submitted on behalf of the State Respondents, *i.e.*, the State of Indiana, Indiana Secretary of State Rokita, and Indiana Election Division Co-Directors King and Potesta.

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STATEMENT OF THE CASE

Indiana requires citizens voting in-person on election day, or casting a ballot in-person at a county clerk's office prior to election day, to present photo identification issued by the United States or the State of Indiana. Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1 ("Voter ID Law" or "Law"). The identification must bear an expiration date that either has not yet occurred or occurred after the date of the most recent general election. Ind. Code § 3-5-2-40.5(3). The Law does not apply to voters receiving and casting absentee ballots by mail, or to those who vote "in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code §§ 3-10-1-7.2(e), 3-11-8-25.1(c), 3-11-10-1.2. Indigents and religious objectors may cast provisional ballots and have until noon 10 days after election day to validate them by affidavit at the county clerk's office. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c).

I. Historical Context for the Voter ID Law

Two historical developments place the Indiana Voter ID Law into proper context: the relatively recent election-modernization movement (which is based in part on national reports of in-person voter fraud), and a long developing problem of voter-list inflation.

1. In *Bush v. Gore*, 531 U.S. 98, 104 (2000), the Court expressed hope that "legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting." The 2000 Florida controversy prompted calls for election

reform of all types, including not only voting machines, but also recount standards, registration rules, provisional-ballot requirements, and voter-identification regulations. *See* Andrew Gumbel, *Steal this Vote: Dirty Elections & the Rotten History of Democracy in America* 325 (2005). Analysts have repeatedly criticized States' election procedures as hopelessly antiquated, inefficient, and vulnerable to manipulation. *Ind. Democratic Party v. Rokita*, No. 1:05-CV-634-SEB-VSS, Docket No. 82, Ex. 6, at 15 (S.D. Ind. Dec. 1, 2005) [hereinafter "State S.J.Br."] (study by Lori Minnite and David Callahan). Former President Jimmy Carter has said that the Carter Center would "never agree to monitor an election" in the United States because "'[t]he American political system wouldn't measure up to any sort of international standards . . . .'" Gumbel, *supra*, at 1.

At the same time, credible nationwide reports of voter-impersonation fraud have been frequent. Since October 2002, the U.S. Department of Justice has launched more than 180 investigations into election fraud, some of which have resulted in charges for multiple voting. State S.J.Br. Ex. 2, at 2. Reports of decedent votes emanate from many States. State S.J.Br. Exs. 4, 11-15. In November 2000, the Atlanta Journal-Constitution reported that since 1980, 5,412 votes had been cast in the name of decedents in Georgia. State S.J.Br. Ex. 12, at 1. In St. Louis, 14 dead people reportedly voted in 2000. John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* 64 (2004).

In Washington's 2004 gubernatorial elections, where the margin of victory was 129 votes, the tally

included more than 1,600 fraudulently cast ballots, including 19 decedent votes, six double votes, and 77 votes unaccounted for on the registration rolls. State S.J.Br. Ex. 3, at 4-5, 19. In Wisconsin, a multi-jurisdictional investigation after the 2004 elections documented more than 100 double votes under fake names and addresses. State S.J.Br. Ex. 4, at 2. In that election, utility bills sufficed for same-day-registrant identification, Wis. Stat. § 6.55(7)(c)(12) (2005) (repealed 2006), and ballots cast exceeded registrations by 4,609, nearly 2% of the total votes. *Id.* at 5.

Records suggest that 300 Missouri voters may have voted twice in the 2000 and 2002 elections. State S.J.Br. Ex. 8, at 1. An official investigation of only two Missouri counties following the 2000 election revealed over 1,000 fraudulent ballots, including at least 68 multiple votes, 14 decedent votes, and 79 vacant-lot votes. State S.J.Br. Ex. 6, at 43; Ex. 7, at 3-6. Residents near the Missouri-Kansas border have voted in both States. *United States v. Jones*, No. 05-CR-00257 (W.D. Mo. 2005); *United States v. Martin*, No. 05-CR-00258 (W.D. Mo. 2005); *United States v. Scherzer*, No. 04-CR-00401 (W.D. Mo. 2004); *United States v. Goodrich*, No. 04-CR-00402 (W.D. Mo. 2004); *United States v. McIntosh*, No. 04-CR-20142 (D. Kan. 2004). In 2004, 235 ballots were cast in the names of decedents in Missouri. Matt Wynn, *Deceased Still on State's Voting Rolls*, Columbia Missourian, Nov. 2, 2006.

In Indiana, the Supreme Court invalidated the 2003 East Chicago mayoral primary based on evidence of rampant absentee-ballot fraud. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1154 (Ind. 2004). The

Lake County Vote Fraud Task Force has notched 37 convictions for various types of fraud, including voting in the wrong precinct and mishandling absentee ballots. *Vote Fraud Task Force Claims Three More*, Merrillville Post-Trib., Nov. 9, 2007, at A6. Reports of vote fraud have arisen elsewhere in the State as well. U.S. Election Assistance Comm'n, *EAC Voting Fraud—Voter Intimidation Preliminary Research—Absentee*, at 82 (reporting accusations of vote fraud in Marion, Porter, and Madison counties); *Machine Problems, Ballot Probe Mar Voting in Indiana Counties*, AP Alert, Nov. 8, 2006 (discussing FBI investigation of possible ballot tampering in Monroe County). While these investigations have not yet yielded convictions for impostor voting, they evidence a political culture where political bosses resort to fraud to sway elections.

In response to the developing national concern over antiquated voting systems and reports of election fraud, Congress enacted the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) ("HAVA"). HAVA provides funds for statewide voter-registration systems, computer-based voting technology, voter education, and poll-worker training. 42 U.S.C. § 15301(b). HAVA requires States to afford anyone whose right to vote is challenged the opportunity to cast a provisional ballot. 42 U.S.C. § 15482(a). It also requires first-time voters who register by mail without proof of identification to present identification either to the county voter-registration office or at the polls. 42 U.S.C. § 15483(b); *see also* 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) ("By passage of this legislation, Congress has made a statement that vote fraud exists in this country.").

Following national trends, the Indiana legislature has enacted many election-modernization reforms. In 2001, it funded new voting systems, Ind. Code § 3-11-6.5-2, and authorized satellite absentee-voting precincts. Ind. Code § 3-11-10-26.3. In 2002, Indiana required a voters' bill of rights to be posted in every precinct. Ind. Code §§ 3-5-2-50.4, 3-5-8 *et seq.* In 2005, the General Assembly not only enacted the Voter ID Law, but also placed new restrictions on absentee voting and handling absentee ballots. Ind. Code §§ 3-11-4-2, 3-11-10-24(c)-(d). It also eliminated the use of outdated lever and punch card voting systems. Ind. H. Enrolled Act No. 1407, §§ 145-46, Ind. Pub. L. No. 221-2005 (repealing Ind. Code §§ 3-12-2.5-1 to 3-12-2.5-10). In 2006, the General Assembly enacted a "vote center" pilot program. Ind. Code § 3-11-18 *et seq.*

Cheering along the election-modernization movement, in September 2005, a commission chaired by former President Carter and former Secretary of State James A. Baker, III, issued a report that recommended many election reforms. Comm'n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* (Sept. 2005) [hereinafter "Carter-Baker Report"]. It suggested, for example, that States create universal, interconnected voter-registration systems and experiment with vote centers. *Id.* at 10-15, 36. The Commission also addressed in-person vote fraud, emphasizing that "there is no doubt that it occurs." J.A. 138. The Commission recommended requiring photo identification at the polls to deter fraud. J.A. 138-40.

2. The second relevant historical trend concerns the inflation of Indiana's voter-registration lists in

the wake of the National Voter Registration Act, widely known as "Motor-Voter," a development that has created opportunities for election fraud.

Enacted in 1993, Motor-Voter has had a dramatic impact on voter-registration rolls. Its signature accomplishment was to require States to provide voter registration at various government locations, principally license branches but also state welfare offices. 42 U.S.C. §§ 1973gg-3, 1973gg-5.

An unintended negative effect, however, has been to inflate voter lists with millions of invalid registrations. J.A. 166 (discussing the "burgeoning of the voter registration lists across the nation"). Motor-Voter significantly restricts how States keep their voter-registration lists accurate by requiring several steps to confirm addresses before cancelling obsolete registrations. States satisfy this duty by sending notices to individuals identified by the U.S. Postal Service as having completed change-of-address cards. 42 U.S.C. § 1973gg-6(c). The notice advises the voter either to return the card or vote in one of the next two general elections to avoid being purged. 42 U.S.C. § 1973gg-6(d).

The result is substantial list inflation. State S.J.Br. Ex. 26. In both 2000 and 2004, numerous States actually recorded registration rates over 100% of voting-age population ("VAP"). *Id.* at 1. Between 1992 and 2004, the percentage of nationwide VAP registered to vote skyrocketed from 75.87% to 86.84%. *Id.*

In Indiana, this problem hit home in 2000, when the Indianapolis Star found more ~~tha~~n 300 decedent

registrations. J.A. 147. The State's expert in this case compared actual Indiana voter registrations with self-reported registrations and estimated Indiana's list inflation to be 41.4%, among the highest in the nation. J.A. 177-78, 184.

Indiana's voter-list maintenance efforts were further hampered by partisan gridlock within state government over how to conduct voter-list maintenance. After a Department of Justice lawsuit in 2006, the State signed a Consent Decree requiring specific voter-list-maintenance programs, including a statewide address-confirmation mailing to all voters. J.A. 299-307. The Indiana Election Division has sent more than 700,000 mailings to identify potentially invalid registrations and has forwarded the results to county registration offices. None of these "inactive" registrations, however, can be cancelled until after the 2008 general election. Until then, both legitimate voters and impostors can save them from cancellation by using them to vote. Moreover, the State cannot cancel any registrations, only county voter-registration offices (who are not party to the Consent Decree) can do so. Ind. Code §§ 3-7-38.2-2, 3-7-38.2-15, 3-7-43-1, 3-7-45-3.

II. Evidence of the Impact of the Voter ID Law

None of the Petitioners in this case is a registered voter who cannot vote because of the Voter ID Law. Pet.App. 5, 47-58, 101-03. Nor could Petitioners identify even one member or constituent who cannot vote because of the Law. Pet.App. 5, 101-03.

The Democrats, however, attempted to prove that the Law would have a disparate negative impact

based on the race, education, and income of voters. Kimball Brace compared Marion County, Indiana's voter-registration list with demographic information of individuals from Marion County to whom the Indiana Bureau of Motor Vehicles ("BMV") had issued photo identification. Pet.App. 60-73. Brace, however, could not generate any reliable data showing that minorities, low-income, or low-education residents are disproportionately less likely to have photo identification. J.A. 279-80; Pet.App. 67-68, 70-71. The district court rejected Brace's study, but also observed that Brace's own disparate-impact-skewed data showed that 99% of the Indiana VAP already had some form of state-issued photo identification. Pet.App. 61, 69. Meanwhile, only 66.8% of Indiana's VAP reported being registered to vote in 2004. J.A. 177.

The only published study of Indiana voter turnout since implementation of the Voter ID Law shows *no* negative disparate impact on the groups studied by Brace. In his November 2007 study, Jeffrey Milyo of the Truman School of Public Affairs at the University of Missouri reports that "[o]verall, voter turnout in Indiana *increased* about two percentage points" after photo identification. Jeffrey Milyo, Inst. of Pub. Policy, Report No. 10-2007, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, at 1 (Nov. 2007) (emphasis added) [hereinafter "Milyo Study"]. Furthermore, "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties." *Id.* at Abstract. Milyo concludes: "The only consistent and frequently significant effect

of voter ID that I find is a positive effect on turnout in counties with a greater percentage of Democrat-leaning voters." *Id.* at 1.

SUMMARY OF THE ARGUMENT

The Indiana Voter ID Law establishes reasonable, long-overdue election-security reform in a State highly vulnerable to in-person election fraud. It represents one among many attempts by Indiana, other States, and Congress to modernize dysfunctional voting practices. Far from being a novel, partisan, voter-suppression gimmick, the Voter ID Law is a mainstream outgrowth of the election-modernization movement. Given both this utterly benign historical context and Petitioners' impassioned accusations of discrimination, perhaps the most instructive fact about this case is that none of the Petitioners has identified even one member or constituent unable to vote because of the Voter ID Law. This resounding failure defeats Petitioners' case for unconstitutionality at every level.

I. First, the lack of any injured voters thrusts substantial Article III standing questions to the fore. Petitioners are two units of the Democratic Party, two candidates, and a collection of political-interest groups. The Democratic Party units and the political-interest groups have no voting rights of their own to assert, and Candidates Crawford and Simpson already have photo identification. All Petitioners (1) claim novel injury to themselves, and (2) assert the right to litigate in the name of supposedly injured "members" or constituents.

a. The Indiana Democratic Party claims injury by virtue of expending resources to help others comply with the Law. It has not, however, shown that the Voter ID Law frustrates any specific objectives of the Party, and it identifies no statutory or constitutional right of its own that the Law impinges, so its expenditure of resources is insufficient.

Nor have candidates Crawford and Simpson alleged cognizable injury to themselves, either as voters or as candidates. Both claim offense at having to show identification at the polls, but mere offense is not Article III injury. Furthermore, the Voter ID Law does not regulate Crawford and Simpson as candidates, and they have identified no injured supporters, so they may not assert *jus tertii* standing.

b. To invoke associational standing, an organization must prove it has members who suffer direct injury. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An inherently critical safeguard is that the association be accountable to the members it claims to represent. The Indiana Democratic Party and at least two of the political-interest groups, however, have no real "members" (or the substantial equivalent) to whom they are accountable. Further, all plaintiff organizations have unilaterally declared the right to sue on behalf of unidentified, hypothetical supporters supposedly injured by the Law. This is insufficient under Article III, which requires proof of the existence of injured members.

II. Second, the lack of any actual injured voters conclusively refutes Petitioners' "severe burden" theory and underscores the Law's narrow tailoring. How onerous can the Law be if a major political party, two seasoned candidates, and four substantial political-interest groups cannot find even one person injured by it?

The Voter ID Law is unlike other election regulations that the Court has subjected to strict scrutiny, such as poll taxes, durational residency requirements, and property-ownership qualifications. The Court has expressly distinguished between such substantive voter qualifications and benign procedural safeguards, such as advance-registration requirements. The former were suspect because the State totally denied the franchise to an entire class of residents that had no way to gain eligibility to vote. The latter, in contrast, merely establish reasonable election protocols and afford citizens ample opportunity to ensure their own ability to vote. Like voter registration, the Voter ID Law provides procedural protection of election integrity and is not subject to strict scrutiny. At most, it is subject to relatively mild review that balances the State's compelling interest in preventing election fraud against the minor burdens imposed by the Law.

Much of Petitioners' argument for strict scrutiny turns on the theory that the Law discriminates against a host of groups, including minorities, the poor, the elderly, non-drivers, urban residents, and Democrats. No evidence supports these assertions, and Petitioners' own submissions refute them. First, there is no allegation or proof of purposeful

discrimination. Second, Kimball Brace found—even with data skewed in favor of the Democrats—no likely negative disparate impact on minorities or low-income citizens. Instead, Brace's data established that 99% of Indiana's VAP already possess photo identification, which alone renders untenable any theory of discrimination and proves the insignificance of any burdens the Law imposes.

Furthermore, a recent academic review of voter turnout in Indiana before and after the Law became effective—the only study of its kind—shows *zero* negative disparate impact on minorities, the poor, and the elderly. It also shows a statistically significant *positive* disparate impact in counties with high concentrations of Democrats. Meanwhile, the Petitioners' own extra-record studies do not suggest negative disparate impact on minorities or other vulnerable demographic groups. As implied by the extraordinarily large majority public support the Law enjoys, there is no political discrimination at work here.

III. The Voter ID Law is a legitimate and reasonable fraud deterrent. It is just one part of a larger effort to modernize elections, and it responds both to growing concerns about election fraud and to Indiana's highly inflated voter-registration lists, which invite fraud. The State bears no burden of proving the need for fraud-prevention measures, but if necessary, its evidence of voter-list inflation and reports of fraud locally and nationally more than suffice. Further, the Law increases public confidence in the integrity of Indiana's elections.

Finally, Indiana's Voter ID Law contains several safeguards to accommodate the 1% of VAP allegedly without government-issued photo identification. The BMV must issue non-license photo identification free to voters who need it. Voters who arrive at the polls without identification may cast a provisional ballot and validate it within 10 days at the county clerk's office—far more time than the 48 hours recommended by the Carter-Baker Commission. Indigents who must pay a fee to obtain identification (such as for a birth certificate) and religious objectors may cast provisional ballots and validate them without identification. The Law does not apply to mail-in absentee ballots, so the elderly and disabled will not need photo identification.

On this record, there can be but one conclusion: the State's compelling interest in preventing fraud through the Voter ID Law outweighs the minimal burdens the Law imposes on the right to vote. Not only that, but even if strict scrutiny applies, the State has proven a compelling need for the Law and sufficient narrow tailoring for the Law to survive.

ARGUMENT

I. Article III Standing Collapses Because No Plaintiff Has Identified Even One Person Unable to Vote Because of the Voter ID Law

The Court must ensure Article III jurisdiction in every case, even if the issue is not explicitly included in the question presented. *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S.Ct. 1854, 1860 (2006). Here, standing fails because no Petitioner suffers injury-in-fact or represents anyone unable to vote because of the Voter ID Law.

A. No Plaintiff suffers cognizable direct injuries

1. The Democrats claim injury from the Voter ID Law because the Party expends resources to help supporters comply with the Law. Dem.Br. 56-57 (citing *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). In *Metro. Washington*, however, the plaintiff did not merely expend resources in response to changes it did not like; it identified a specific objective (less airport noise) that the defendants' threatened action (more airport traffic) self-evidently contravened. *Metro. Wash.*, 501 U.S. at 264-65. The Democrats have not identified any specific objective that the Voter ID Law inherently or empirically frustrates; indeed, the available evidence suggests the party benefits from the Law. *See* Part II.B.2, *infra*.

In *Havens*, an organization sued to vindicate a right statutorily guaranteed to "all" persons that the defendant denied it. *Id.* at 376 n.16. Here, no statute grants any organization a right to defend. There is no "right" for a group to exist free of the possibility that a new law might alter its spending priorities.

2. Candidates Crawford and Simpson have claimed injury to themselves as voters and as candidates. As voters, Crawford and Simpson claim only to be "offended" by having to show identification at the polls. J.A. 73-74, 82-83. Mere offense, however, is not cognizable Article III injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

As candidates, Crawford and Simpson claim to represent the rights of hypothetical supporters who would vote for them but for the Voter ID Law. Pet.App. 84; *Powers v. Ohio*, 499 U.S. 400, 411 (1991). They have not, however, identified any such supporters, Pet.App. 84-85, so they have not proved even this attenuated injury. Moreover, to assert *jus tertii* standing as candidates, Crawford and Simpson must show that they are *regulated* as candidates, which they are not. They are regulated as voters, but have no special relationship in that capacity to other voters.

The district court's theory of representational standing on behalf of voters who inadvertently fail to bring identification to the polls cannot work either. Pet.App. 85. Crawford and Simpson have no basis for *jus tertii* standing, period. And any hypothetical voter who forgets to bring identification to the polls can vote provisionally and then validate the ballot by

bringing identification to the clerk's office within ten days of the election. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c). There is no potentially unredressable on-the-spot injury that justifies representation of forgetful voters in this lawsuit.

B. Without identifying injured members, neither the Democrats nor the other political-interest groups can assert associational standing

Associations may assert the rights of members only if they identify at least one who is genuinely injured. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). None of the groups has met that burden.

1. The Democrats tried and failed to identify members injured by the Law

Both the Indiana Democratic Party and the MCDCC claim "associational standing to sue on behalf of their affected members, citizens who support the Democratic Party and its purposes but lack the mandated photo ID." Dem.Br. 58. In discovery, the MCDCC identified four members, but also acknowledged that none was injured by the Law. J.A. 197-98, 203-04. The MCDCC, therefore, does not have associational standing.

The Indiana Democratic Party has no "members" in the traditional sense. Its bylaws provide that "[a]ny legally qualified Indiana voter who supports the purposes of the Party may be a member," J.A. 194, but do not explain how to become a member or

quit being a member. Organizations can only assert the rights of members who have some capacity to control the organization, even if only by disassociating. *Hunt*, 432 U.S. at 343-44. Accountability is critical for associational standing, and the Indiana Democratic Party lacks it.

In Indiana, one does not register as a member of a political party. At primaries, citizens vote the ballot of whichever party they wish, Ind. Code § 3-10-1-6, so voting in a primary is not a meaningful signal of "membership." There is a nominal requirement that a voter either have voted for a majority of the party's candidates at the last general election or pledge to support a majority of the party's candidates in the coming general election, Ind. Code § 3-10-1-6, but that law is not practically enforceable. *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224-25 (1986) (invalidating law closing party primary to independents). Voters may participate in a party's primary for many reasons, the least of which may be to actuate membership, much less to give consent to representation in a lawsuit. Besides, even if voting in a primary gave some indication of membership, there is no way to quit, as the Democrats' own supposedly injured "members" confirmed. J.A. 209 (Deposition of David Harrison) (asked how one might leave the Democratic Party: "He doesn't. Once a Democrat, always a Democrat."); J.A. 217 (Deposition of Constance Andrews) (asked how she might leave the Democratic Party: "I guess when I die.").

The Indiana Democratic Party has never put forth a realistic theory as to who constitutes a "member." It claims to represent all who have ever

voted for a Democrat or might do so in the future. The doctrine of associational standing, however, depends on *voluntary* association. *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) (associations are groups of individuals who "band together"). Voting for a Democrat does not constitute volunteering to have one's interests represented in this lawsuit. The essential requirement that those represented have collective control over the case is missing.

Regardless, the Democrats have not identified any putative members injured by the Voter ID Law. Each supporter they identified as injured either has photo identification or is entitled to vote absentee without it. Pet.App. 80-82. Without proof of injured members, the Party has no associational standing. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Nor may the Democrats assert the rights of hypothetical voters who through happenstance fail to bring identification to the polls. Pet.App. 78-79; Dem.Br. 59-60. There is no Article III doctrine permitting an association to hypothesize rather than to prove the injuries to members that it claims to vindicate. Besides, voters stymied at the polls by happenstance have a provisional-ballot remedy. Ind. Code § 3-11.7-5-2.5.

2. The political-interest groups also failed to identify any members injured by the Law

The political-interest groups have also failed to identify any legitimate members injured by the Voter ID Law. Like the Democrats, Plaintiffs IRCIL and CCI unilaterally designate "members" and then

presume to litigate on their behalf. IRCIL's bylaws proclaim that its "members" include "the people with disabilities whom we serve," but nowhere provide those "members" any means of disassociating. J.A. 42. Similarly, CCI alleges that its members include "poor persons" in the City of Indianapolis, but provides no exit from membership. J.A. 62, 65.

Further, none of the political-interest groups identified any "members" adversely affected by the Voter ID Law. J.A. 22, 28, 43, 47-48, 51, 63-64. The groups have vaguely alluded to unidentified persons who *might* be injured, but that is not enough. *Hunt*, 432 U.S. at 343-44.

II. The Balancing Test for Non-Discriminatory Laws Protecting Election Integrity Applies Here

Even if the Court somehow finds Article III standing, the lack of any injured voters conclusively demonstrates the absence of any "severe burden" and the manifest reasonableness of the Voter ID Law.

The Elections Clause, U.S. Const. art. I, § 4, provides the basic framework for analysis.[1] On one hand, it embraces the authority of States to enact comprehensive election regulations "not only as to times and places, but in relation to . . . prevention of

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[1] The Elections Clause, in conjunction with Article I, § 2 and Article II, § 1, is the font of the constitutional right to vote, a right later reinforced by Amendments I, XIV, XV, XVII, XIX, XXIII, XXIV, and XXVI. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).

fraud and corrupt practices" so as to "enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."). On the other hand, it grants Congress superseding authority to "make or alter" federal election regulations "at any time." U.S. Const. art. I, § 4, cl. 1. The Elections Clause signifies that discretionary legislative authority over elections is important because no "election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country." The Federalist No. 59, at 384 (Alexander Hamilton) (Modern Library Coll. ed. 1937).

All States have enacted complex election laws, each provision of which "will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Indeed, "[e]ach provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Even so, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

The Voter ID Law represents a reasonable, non-discriminatory exercise of Elections Clause authority

that, just as the Founders envisioned, takes account of "change in the situation of the country" and advances the agenda of election modernization. Federalist No. 59, *supra*, at 384. It does not establish any new criteria for voting, but instead provides a reasonable method of verifying voter identity—a fundamental, pre-existing voter-eligibility criterion. The Voter ID Law protects the franchise by ensuring that those who meet substantive eligibility requirements have their votes counted at full strength, undiluted by ineligible voters. *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7 (2006) (per curiam) (recognizing that voter-identification laws "prevent[] voter fraud" and consequent "'debasement or dilution of the weight of a citizen's vote'").

A. The Voter ID Law does not impose a "severe burden" on the right to vote

The Court has long rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick*, 504 U.S. at 432. Otherwise, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* at 433; *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens . . . severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.").

A voting regulation is subject to strict scrutiny only if it imposes a "severe burden" on the right to vote. *Burdick*, 504 U.S. at 434. Otherwise, it is valid so long as, balanced against "the character and magnitude of the asserted injury," it reasonably vindicates important state interests in electoral integrity. *Id.* (internal quotations omitted). Moreover, "voting-rights laws" are treated the same as "ballot-access laws." The Court has observed that its precedents "minimize[] the extent to which voting rights cases are distinguishable from ballot access cases . . . the rights of voters and the rights of candidates do not lend themselves to neat separation." *Id.* at 438 (internal quotations omitted). That is, ballot-access restrictions infringe some voters' rights no less than other voting laws. *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *see also Anderson*, 460 U.S. at 788.

1. The Court does not apply strict scrutiny to laws that merely regulate voting procedures in an evenhanded way. In *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973), the Court upheld a "lengthy" enrollment deadline for voting in a party's primary as "tied to a particularized legitimate purpose" and "in no sense invidious or arbitrary." The Court has similarly upheld advance voter registration because "States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds." *Marston v. Lewis*, 410 U.S. 679, 680 (1973).

In *Rosario*, moreover, the Court expressly distinguished between inherently suspect voter-qualification laws—laws disenfranchising soldiers,

creating special electorates, and imposing durational residency requirements—and benign fraud-prevention procedures. *Rosario*, 410 U.S. at 757. *Voter-qualification* laws have been problematic because those laws "totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Id.* at 757. But with *procedural* rules, responsibility lies with *voters*: "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment." *Id.* at 758.

This distinction between laws that affect voter qualifications and those that merely regulate election procedure has its roots with the Founders. Alexander Hamilton, discussing the Elections Clause, distinguished between "[t]he qualifications of the persons who may choose," which are "defined and fixed in the Constitution, and are unalterable by the legislature," and authority over "the *manner* of elections," where States have primacy. The Federalist No. 60, at 394 (Alexander Hamilton) (Modern Library Coll. ed. 1937).

The Voter ID Law is a procedural anti-fraud device affecting only the *manner* of elections, in no way comparable to voter-qualification laws the Court has subjected to strict scrutiny. The Law vindicates the very premise of voter-registration by protecting the right to vote at full value. It interposes minimal, if any, interference with legitimate voters, making strict scrutiny inappropriate.

2. Perhaps the most potent evidence rebutting the Petitioners' "severe burden" theory is their failure to identify *even one* eligible voter unable to vote because of the Law. As the district court found, "[d]espite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting" by the Voter ID Law. Pet.App. 101.

Nor is this case unusual in this regard. The same thing has happened in challenges to similar photo-identification requirements around the country. *See, e.g., Common Cause/Ga. v. Billups*, 504 F.Supp.2d 1333, 1372-74, 1380 (N.D. Ga. 2007) (rejecting the "severe-burden" theory because lack of injured voters "provides significant support for a conclusion that the Photo ID requirement does not unduly burden the right to vote"); *see also Gonzalez v. Arizona*, 2006 WL 3627297, at *7 (D. Ariz. 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007) (rejecting severe-burden argument because plaintiffs identified no one who "wish[ed] to vote but [was] *actually* unable to obtain identification"); *ACLU of N.M. v. Santillanes*, 506 F.Supp.2d 598, 623 (D.N.M. 2007) ("Plaintiffs have not identified a single voter who has been denied the right to vote based on the photo ID requirement."); *Perdue v. Lake*, 647 S.E.2d 6, 7-8 (Ga. 2007) (dismissing challenge because plaintiff had photo identification).

3. Furthermore, the data supplied by the Democrats' expert witness, Kimball Brace, disproves any "severe burden." Brace attempted to prove the Voter ID Law would have a disproportionate negative impact on the poor, the elderly, and

minorities, but the district court rejected his study as "utterly incredible and unreliable." Pet.App. 60. Yet the district court also noted that, "[t]o the extent that the Brace report reveals anything relevant, it is limited to the fact that the vast majority, which is to say up to 99%, of Indiana's [VAP] already possess an Indiana driver's license or an identification card." Pet.App. 104.

Petitioners agree with this estimate of 99% pre-enforcement compliance, Dem.Br. 12; ACLU Br. 12, but then proceed as if the entire remaining 1% will necessarily be burdened by the Law. They do not, however, show that *any* of these estimated 43,000 individuals (1) are registered to vote;[2] and (2) would like to vote; but (3) will be unable to vote because of the Voter ID Law.

This is a significant omission because, as of 2004, only 66.8% of Indiana's VAP reported being registered to vote, and only 57.3% reported voting. J.A. 177. Applying the latter percentage straightforwardly to the 43,000 individuals supposedly without identification leaves less than 25,000 voters—0.5% of Indiana's 2004 VAP of 4,592,000 (J.A. 180)—who are even in a position conceivably to suffer a negative impact from the Voter ID Law. And many of those will vote absentee without need for identification. J.A. 170 (noting 10.4% absentee-voting rate in 2004, but not distinguishing mail-in absentee ballots from "absentee" ballots cast at the county clerk's office

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[2] Brace attempted, but failed, to relate BMV records to registered voters, Pet.App. 60-73, and Petitioners no longer appear to rely on this data.

where identification is required, Ind. Code § 3-11-10-26(b)(2)).

If immediate ability to vote is the measurement of the "severity" of a voting law, the Voter ID Law is far less burdensome than Indiana's voter-registration law. Even assuming (unrealistically) that the Voter ID Law prevents all 43,000 citizens who supposedly lack photo identification from voting, by parity of logic, Indiana's voter-registration law prevents over *1.5 million* individuals from voting, which is 33.2% of 2004 VAP. J.A. 180. This represents *35 times* more "severity" than the Voter ID Law. Yet, presumably, no one would argue that voter-registration laws impose a "severe burden" on voting.

4. As for the hypothetical, minuscule percentage of voters who must yet procure government-issued photo identification to be able to vote in-person, Petitioners unfairly atomize each step of the process to make it appear an impossible task. Dem.Br. 12-16; ACLU Br. 14-19. They stress the difficulty of acquiring a birth certificate,[3] secondary document, and proof of address,[4] and the need to travel to the

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[3] Voters born in Indiana may procure a birth certificate from the Indiana Department of Health using many forms of non-photo identification, including a voter-registration card. Dem. S.J.Br. Ex. 7. Local officials "shall issue a certification" of an applicant's own birth registration and need require only one unspecified "form of identification." Ind. Code § 16-37-1-8(a)(3). Refusal to issue a birth certificate is subject to judicial review. Ind. Code § 16-37-1-8(b).

[4] A voter-registration card constitutes proof of address, 140 Ind. Admin. Code § 7-4-3(e)(7), so any homeless

BMV, ignoring the fact that voters without identification need only gather these documents *once* and need not wait until *after* casting a provisional ballot to do so. The way Petitioners describe the process, it is a wonder any Indiana citizens are licensed to drive, let alone able to vote. Yet 99% of Indiana's VAP has managed to accomplish this supposedly arduous task.

Indeed, any inconvenience here is certainly no greater than for registration and in-person voting, which are unquestionably constitutional. To register, a poor, uneducated would-be voter must first investigate *how* to register, which may require a trip to a library (assuming no residential internet access). There, the citizen must either locate a registration form or travel to another agency, such as the BMV or the clerk's office (the very same supposedly hard-to-reach destinations for procuring identification or validating a provisional ballot). The citizen then must complete the application, which has no fewer than 16 questions and half a page of instructions, and mail or submit it in time for the county registration office to receive it no later than 29 days before the election. Ind. Code § 3-7-13-11. The voter must then locate the proper precinct, arrange transportation on election day, possibly pay to park, and perhaps stand in a long line before voting. The effort and expense may exceed the wherewithal of many uneducated, poor, and elderly

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person, if properly registered to vote, can acquire identification. *Cf.* Ind. Code § 3-7-33-5(b)-(e) (requiring eligibility notice to all voter-registration applicants at "the mailing address provided in the application" and requiring denial of the application if the notice is returned for insufficient address).

citizens. (Again, in 2004 only 66.8% of Indiana's VAP reported being registered, and only 57.3% reported voting. J.A. 177.) But that does not make these burdens "severe."

In fact, such inconveniences differ significantly from burdens members of the Court have found problematic. In *Burdick*, for example, Justice Kennedy criticized the Hobson's choice facing voters: "In effect, a Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices." *Burdick*, 504 U.S. at 444 (Kennedy, J., dissenting). There is no similar Hobson's choice here—only the modest requirement that voters undertake the reasonable effort required to procure identification—which at least 99% already possess. The Voter ID Law also has several fail-safe provisions to help ensure that the poor, elderly, and disabled may vote even without identification. *See* Part III.C.2, *infra*; *cf. Burdick*, 504 U.S. at 445 (Kennedy, J., dissenting, for lack of fail-safe provisions).

A voting regulation cannot be suspect merely because it demands some effort on the part of citizens to exercise the right to vote. *Clingman*, 544 U.S. at 593 ("Many electoral regulations, including voter registration generally, require that voters take some action to participate . . . ."); *Rosario*, 410 U.S. at 760-62. Otherwise, States would be under a continuing burden to deregulate elections, in contravention of the Elections Clause and the superintending duties it implies for States.

5. Petitioners argue that the Voter ID Law imposes a "severe burden" on voting because it "departs from usual and customary regulations adopted elsewhere." Dem.Br. 29; ACLU Br. 45. The Law, however, is novel only in the most hyper-technical, and therefore meaningless, sense.

A national consensus is emerging in favor of *some* form of documentary voter identification. Congress requires it for first-time voters who register by mail. 42 U.S.C. § 15483(b). Twenty-seven States have adopted their own voter-identification requirements. *See* Electionline.org, *Voter ID Laws*. Georgia and Florida reportedly *require* photo identification, and Hawaii,[5] Louisiana, Michigan, and South Dakota *request* photo identification. *Id.* Missouri, too, enacted a photo-identification requirement, only to see it invalidated under state law. *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006). Meanwhile, the bi-partisan Carter-Baker Commission endorsed a photo-identification requirement even more restrictive (by requiring validation within 48 hours) than Indiana's. J.A. 143. Thus, Indiana stands in good company.

Fairly considered, requiring government-issued photo identification at the polls represents nothing more than late application of old technology—a "best practice" for election administration. Government-issued photo identification has been the global standard for documentary identification for decades. The record is replete with examples of other

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[5] As Petitioners note, the website of the State of Hawaii notes that voters must have *photo* identification. ACLU Br. 31.

circumstances—some involving the exercise of constitutional rights—where citizens cannot function on a daily basis without government-issued photo identification. Pet.App. 3 (entering federal courthouses and traveling by airplane); Pet.App. 134 (cashing checks and renting movies); State S.J.Br. Exs. 33-36 (obtaining marriage licenses and entering federal courthouses).

In light of such widespread demands for (and concomitant prevalence of) government-issued photo identification, it is almost shocking that in late 2007 Indiana can be characterized as even *unusual* in requiring it at the polls. Unfortunately, the same political pressures that have preserved other antiquated voting procedures have also stunted electoral application of photo identification. With its Voter ID Law, Indiana has struck a blow for protecting legitimate votes and for modernizing elections. If States are to continue striving for electoral systems worthy of history's most successful republic, such incremental progress should not be maligned and scrutinized for being insufficiently commonplace.

B. There is no discrimination against minorities, Democrats, "non-drivers," urban dwellers, the elderly, the poor, the homeless, the disabled, or anyone else

Petitioners say the Voter ID Law imposes a "severe burden" because it is discriminatory. Dem.Br. 31-41; ACLU Br. 40. They have not even alleged, much less proved, discriminatory purpose of *any* type. In fact, Petitioners have expressly agreed

that the purpose of the Law is to combat fraud. ACLU Br. 9-10, Dem.Br. 6; Pet.App.107. And unlike the invalid ballot-access law that inherently burdened independent voters in *Anderson*, 460 U.S. at 793, the Voter ID Law does not innately encumber any "identifiable political group."

1. The Democrats' expert found no evidence of disparate impact on racial minorities

Petitioners suggest the Law will prove racially discriminatory. Dem.Br. 4, 23-24; ACLU Br. 13, 42. To succeed with this theory, they must allege and prove a racially discriminatory *purpose* along with a disparate effect. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Shaw v. Reno*, 509 U.S. 630, 649 (1993) (requiring proof of racially discriminatory purpose, which can be inferred where no other explanation is available). Yet, Petitioners have never even alleged, much less attempted to prove, that the Voter ID Law intentionally discriminates against racial minorities.

Moreover, Petitioners have never shown that the Law is likely to have a discriminatory effect on minorities. Their own expert, Kimball Brace, acknowledged that he was unable to find any racial impact:

> Q: Did you attempt to establish if there was any racial impact to the passage of the new voter ID law in Indiana?
>
> A: As part of the calculation and part of the

> programming, we did look at the racial data, also.
>
> Q: There was no specific racial category, though, in your report. Why wasn't there?
>
> A: Basically, we could not conclude one way or the other in terms of the distinction in terms of racial categories.

J.A. 279.

Petitioners cite an AARP telephone survey allegedly showing that "members of racial minority groups" are "significantly less likely than the citizenry as a whole to possess current drivers licenses or BMV identification cards." ACLU Br. 13. The survey, however, included only seniors over age 60, so it does not show the prevalence of government-issued photo identification among racial minorities generally. J.A. 31. The survey also does not state the percentage of minorities without identification that are either unlikely to vote or over age 65 (and able to vote absentee without identification). J.A. 30-33. Thus, no evidence in the record suggests any disparate impact on minorities.

Petitioners and *amici* now cite extra-record studies to suggest the Law will have such a racial impact. Dem.Br. 12; ACLU Br. 40-41. These studies, however, do not even suggest, much less establish, such a likely disparate impact. For example, one study found that photo-identification requirements had a negative effect on white, but *not* on black or Hispanic turnout. Timothy Vercellotti & David Anderson, *Protecting the Franchise, or*

Restricting It?: The Effects of Voter Identification Laws on Turnout, Presentation to Am. Political Science Ass'n, at 12 & Tables 6-7 (Sept. 2006) [hereinafter "Vercellotti Study"]. Alvarez and his co-authors found the same. R. Michael Alvarez *et al.*, *The Effect of Voter Identification Laws on Turnout*, at 18-19 (Cal. Inst. of Tech., Social Science Working Paper No. 1267, Oct. 2007) (documenting "a more strongly negative effect on the participation of white, relative to nonwhite voters" and "no evidence that voter identification requirements are racially discriminatory") [hereinafter "Alvarez Study"]; John R. Lott, Jr., *Evidence of Voter Fraud & the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates*, at 12 (Aug. 18, 2006) ("It does not appear that there is anything systematic about being African-American, female or elderly that causes one to be adversely impacted by photo IDs.").

Moreover, the *only* study of the Indiana Voter ID Law—by Professor Jeffrey Milyo—shows no negative disparate minority impact. Among other things, Professor Milyo's study finds that "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties." Milyo Study Abstract, 1, 5-7.

Nor does any of the new evidence credibly support the proposition that minorities in Indiana lack photo identification in disproportionate numbers. A study of one county in Wisconsin, to begin, plainly says nothing about the incidence of photo identification in Indiana, much less about the likelihood that those currently without photo

identification will nonetheless be able to vote, or will even want to vote. ACLU Br. 40, n.19. And the last minute, unreviewed working paper from the Washington Institute for the Study of Race and Ethnicity found *no* statistically significant difference between blacks and whites for accurate, valid identification. Matt A. Barreto, *et al.*, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, at 13, 18 & Table 1.1 (Wash. Inst. for the Study of Ethnicity & Race, Working Paper, Nov. 8, 2007) (finding of nominal 4.3% gap between white and black registered voters is not significant under the "traditional 95%" test) [hereinafter "Barreto Study"].

Finally, the telephone survey by the Brennan Center for Justice purporting to find that 25% of black voting-age citizens lack suitable identification has transparent methodological problems. Brennan Center for Justice, *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship & Photo Identification*, at 3 (Nov. 2006). Its anomalous estimate may well stem from the survey's confusing and leading questions or the decision to "weight[]" the "results of this survey" to "account for underrepresentation of race." *Id.* at 1 n.1. Its key findings, furthermore, may not even be statistically significant given (1) the extremely large margins of error (± 8%), (2) the small sample size, and (3) the absence of any supporting data. *Id.* at 1-3 & n.10. Regardless, the Brennan Center survey says nothing about whether blacks in Indiana are less likely to have government-issued photo identification, much less whether any such "difference" exists among those likely to vote.

Petitioners surely may not justify strict scrutiny with new evidence the State had no opportunity to investigate and challenge. Even if the Court were to take judicial notice of the various extra-record studies, however, the only one relevant—the Milyo Study—refutes Petitioners' disparate-impact theory.

2. The Law is not partisan

As the district court observed, this case from the very beginning has represented "a partisan legislative disagreement that has spilled out of the state house into the courts." Pet.App. 18. In that spirit, the Democrats argue that the General Assembly enacted the Voter ID Law to keep Democrats from voting. Dem.Br. 18-19, 39-40. Tney cite nothing to support this charge other than the Party's own legislative resistance in the face of overwhelming bipartisan public support for the Law. Dem.Br. 18-19, 39-40; *see also* Mary Beth Schneider, *Voter ID Law Looming for Hoosiers*, Indianapolis Star, April 13, 2005 (reporting that 75% of respondents support requiring photo identification); Fund, *supra*, at 136 (reporting a 2004 survey showing 89% of Bush voters and 75% of Kerry voters supported requiring photo identification at the polls).

If it takes proof of nefarious purpose and effect to justify suspicion of an election law on *racial* discrimination grounds, it takes at least that to make a case based on *political* discrimination. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality) (requiring proof of partisan purpose and effect for political-gerrymandering claims); *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring) (identifying purposeful discrimination as the focal

point). As with their claims of racial discrimination, Petitioners have never even tried to prove partisan discriminatory *purpose*, so this theory, too, must fail.

Nor is there any evidence that the Law will have a disparate negative effect on Democrat turnout. The Milyo Study, in fact, proves the opposite. It states that "[t]he only consistent and frequently statistically significant impact of photo ID in Indiana is to increase voter turnout in counties with a greater percentage of Democrats relative to other counties." Milyo Study Abstract, 1, 7. Even the Barreto Study finds no statistically significant difference between Democrat and Republican voters possessing accurate, valid identification. Barreto Study 8, 15 & Tables 1, 9-10 (nominal 3.9% difference (82.6% to 86.5%) is smaller than the margin of error of ± 3.1% for each).

It is also worth noting that, if the Voter ID Law was intended to benefit Republicans at the expense of Democrats, it has failed miserably. The Republican-controlled Indiana House that passed the Voter ID Law in 2005 returned to Democrat control in 2006 (when the Law was in full force). Similarly, in 2006, Democrats picked up three Indiana congressional seats as well as the Marion County offices of Assessor, Auditor, Clerk of Courts, and Recorder. The Marion County majority vote for Secretary of State, Auditor of State, and Treasurer of State all went from Republican in 2002 to Democrat in 2006. Ind. Sec'y of State, *2002 General Election Registration & Turnout Data*; Ind. Sec'y of State, *2006 General Election Registration & Turnout Data*.

The Voter ID Law is a party-neutral, good-government reform that helps update a generally antiquated election system. The overt partisan opposition of the Democratic Party apparatus—in contrast with its rank-and-file supporters—does not justify *greater* judicial scrutiny or otherwise override the presumption that the Law serves a legitimate purpose. *Cf. Cal. Democratic Party v. Jones*, 530 U.S. 567, 601 (2000) (Stevens, J., dissenting) (giving weight "to the preference of almost 60% of California voters—including a majority of registered Democrats and Republicans—for a blanket primary"); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting) (preferring views of party rank-and-file rather than insiders and officeholders for purposes of inferring a party's position).

3. There is no discrimination against "non-drivers," urban dwellers, or the poor

The Democrats' next candidate for supposed discrimination at the hands of the Voter ID Law is a group whose political prominence has heretofore escaped national attention: non-drivers. Dem.Br. 34. As with all other discrimination theories thrown against the wall in this case, the accusation of discrimination against non-drivers is a non-starter.

First, it bears observing that, in 1993, a Democrat-controlled Congress enacted Motor-Voter, and a Democrat President signed it. 42 U.S.C. § 1973gg *et seq*. It is disingenuous for Democrats now to argue that utilizing license branches to modernize election procedures discriminates against the poor

and uneducated, the very groups Motor-Voter targeted. 42 U.S.C. § 1973gg(a)(3); *see also* Monique L. Dixon, *Minority Disenfranchisement During the 2000 General Election: A Blast From the Past or a Blueprint for Reform*, 11 Temp. Pol. & Civ. Rts. L. Rev. 311, 316 (2002).

Regardless, the Democrats cite no history of discrimination against non-drivers (which might at least have supplied a plausible plotline), no proof of intent to discriminate against them, and no data showing that non-drivers (1) will be unable to vote because they lack any acceptable form of identification and cannot vote absentee; (2) are otherwise a significant segment of participating voters; and (3) are likely to vote against Republicans.

Moreover, the Voter ID Law affirmatively *accommodates* non-drivers. By law, the BMV must issue non-license identification cards *free* to those needing them to vote. Ind. Code § 9-24-16-10(b). Drivers, on the other hand, must pay a fee of $19.50 for a standard five-year operator's license. *See* Ind. BMV, *Driver Services Fees—Operator License.* It is an odd sort of discrimination that cuts the putative victims a monetary break over their supposedly preferred counterparts.

Petitioners also argue that the Voter ID Law discriminates against "persons who live in urban areas" and citizens in low-income brackets. ACLU Br. 13, 40-41; Dem.Br. 34-35. However, the Democrats' expert witness presented data showing that only a small percentage of Marion County's VAP lacks photo identification, Pet.App. 69-70 & n.42, and he presented *no* reliable data showing the

percentage lacking identification who are registered to vote. Pet.App. 61-63, 69-70. Furthermore, Marion County "has a metro bus system and multiple BMV branch locations thereby greatly facilitating the ability of these affected individuals to obtain the necessary photo identification." Pet.App. 70.

The Democrats cite voter turnout in Marion County vis-à-vis the rest of the State in 2006 versus 2002 as evidence of anti-urban bias, though they fully acknowledge that "there may be other explanations" besides the Voter ID Law for lower turnout. Dem.Br. 35. "Other explanations" are far more likely. Comparing 2006 to 2002 in Lake County—a highly urban area near Chicago—shows that absolute voter turnout increased by 11% and the turnout rate relative to the state improved by 6%. Ind. Sec'y of State, *2002 General Election Registration & Turnout Data*; Ind. Sec'y of State, *2006 General Election Registration & Turnout Data.*

With respect to income, the evidence debunks any allegation of disparate burden on the poor. The district court observed that "Brace's report, to the extent it is accurate, actually indicates that voters without photo identification are *not* significantly more likely to come from low income segments of society." Pet.App. 72 (emphasis added). This is because "under any of Brace's criteria, between 61% and 65% of his unmatched voters live in census blocks with median incomes above $35,000, which roughly corresponds to the 63.9% of the voting age population he lists as residing in those areas." Pet.App. 72. Even the eleventh-hour Barreto Study shows no wealth-based disparities. Barreto Study 21

& Fig. 3 (showing voters with income over $80,000 are 4.3% *less* likely to possess photo identification than those between $40,000 and $80,000, and no statistically significant difference between those earning under $40,000 (78.9%) and those earning over $80,000 (83%)).

In addition, Indiana's indigency exception ameliorates any voting-related burden on the poor caused by lack of identification. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c). Again, the Milyo Study shows that in Indiana counties with greater percentages of elderly, uneducated, poor, or minority voters, turnout *increased* in 2006. Milyo Study Abstract, 1, 5-7. Indeed, all but one of the studies on voter turnout have found no disparate impact on low-income groups. Vercellotti Study 13 ("There were no significant differences in terms of . . . income.").

The Democrats point to the only study that purportedly reaches a different conclusion. Dem.Br. 34-35 (citing Alvarez Study). But that Study found only that low-income voters are less likely to vote in States requiring photo identification than in States "that simply require the voter [to] provide their name." Alvarez Study 19. It identified *no* decline in low-income voter turnout in States requiring photo identification compared with States using *signature-match* requirements. *Id.* at 19, 22. That is particularly significant because before the Voter ID Law, Indiana was a signature-match State, not a "state your name" State. Ind. Code § 3-11-8-25(a) (2005) (repealed 2006). Furthermore, the Alvarez Study does not account for the impact of the Law's indigency exception, and any income-group disparate impact may only reflect legitimate fraud deterrence.

4. The Law *accommodates* elderly and disabled voters

The final illusory categories of supposed Republican discrimination against political foes are the elderly and disabled. Dem.Br. 34; ACLU Br. 13. The elderly, however, are hardly an identifiable Democratic constituency. For example, President Bush received 52% of the vote of those over age 65 in 2004. Amicus Br. of Historians & Other Scholars 29 n.66.

In any event, the Voter ID Law affirmatively accommodates seniors and the disabled. It does not apply to voting absentee by mail, which means that the disabled and seniors over 65 (who are automatically entitled to vote absentee) face no ill effects from the Law even if they have no photo identification. Ind. Code § 3-11-10-24. In addition, residents of state licensed-care facilities who vote at polling places within those facilities need not present photo identification. Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1(e). This accommodates the very small subset of elderly voters who cannot travel to obtain photo identification, but also who do not need to travel to vote at the polls.

Furthermore, no studies have found disparate negative impact on elderly voter turnout. Vercellotti Study 13; Alvarez Study 19. In Indiana specifically, counties with larger elderly populations saw no statistically significant change in voter turnout after the Voter ID Law. Milyo Study 12-13.

Petitioners nonetheless attempt to show a likely disparate negative impact on seniors by citing the

same AARP telephone survey. ACLU Br. 13. That survey shows *97%* of seniors have state-issued photo identification, an astonishingly high figure for a group supposedly targeted for systematic disenfranchisement. J.A. 33 n.3. Beyond that, the study does not disclose whether any of the remaining 3% are likely to vote or are at least 65 (or under 65 but disabled). Without providing such data—and without disclosing details of the representativeness of its sample—the AARP survey cannot suggest that the Voter ID Law will disproportionately burden seniors.

C. The Voter ID Law has nothing in common with poll taxes

Petitioners urge strict review by comparing the Voter ID Law to poll taxes. ACLU Br. 36; Dem.Br. 31-32. They argue that any law requiring a voter to have a document constitutes a poll tax. ACLU Br. 36; Dem.Br. 31-32. But if that were true, voter registration, which provides voters with documentary proof of registered status, would constitute a poll tax, as would HAVA's own voter-identification requirements. 42 U.S.C. §§ 15483(a)(5), 15483(b); *cf. Clingman*, 544 U.S. at 591 ("In Oklahoma, registered members of the Republican, Democratic, and Reform Parties who wish to vote in the LPO primary simply need to *file a form* with the county election board secretary to change their registration.") (emphasis added).

The Court invalidated poll taxes as a condition of voting because of the racially discriminatory history behind such taxes and because "[v]oter qualifications have no relation to wealth nor to paying or not

paying this or any other tax." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). It later invalidated a law conditioning the federal franchise on either paying a poll tax or certifying residence. *Harman v. Forssennius*, 380 U.S. 528, 541 (1965). Critically, payment of a per capita tax lay at the root of the problem. *Id.*

In contrast, proper identification plainly bears a legitimate relationship to voting, and the Voter ID Law imposes no tax and carries no history suggesting racial discrimination. Non-license identification is free to voters, and fees for birth certificates (which have existed since 1907) are merely for the service, not a general exaction. State S.J.Br. Exs. 48-49; Dem. S.J.Br. Ex. 7. Indigents needing to pay a fee for a birth certificate to get identification are exempt from the Voter ID Law. Ind. Code § 3-11.7-5-2.5(c).

As a functional matter, moreover, the vast majority of voters are not suddenly required to pay a fee to the State for the privilege of voting. *Harper*, 383 U.S. at 666-68. Again, 99% already have conforming photo identification in the form of a driver's license or non-license photo-identification card. Many of the remaining 1% who wish to vote will be able to vote absentee without photo identification, or else procure identification from the *federal* government or a birth certificate from *another* State, and in all events need pay any fee only *once*. In contrast, the Virginia poll taxes invalidated in *Harper* and *Harman* were assessed against *all voters* in *every election*. *Harper*, 383 U.S. at 668; *Harman*, 380 U.S. at 541. If the Voter ID

Law is meant to condition voting on payment of a fee to the State, it is remarkably inept legislation.

III. The Voter ID Law Is an Eminently Reasonable Effort to Combat In-Person Voter Fraud, Which Has Always Existed Across the Country

The Voter ID Law serves two purposes. First and foremost, it helps with deterring and detecting in-person voter fraud, a long-recognized compelling interest of the State. *Marston v. Lewis*, 410 U.S. 679, 681 (1973). Second, it helps safeguard voter confidence in the legitimacy of election results, an interest the Court has repeatedly deemed compelling. Further, the means to vindicate these interests is so well tailored that the Voter ID Law stands up to any level of scrutiny.

A. Nearly all voting regulations are premised on the need to prevent fraud, and proof of recent fraud is not necessary to keep them

Indiana does not need to prove prior voter impersonation to justify preventing it from happening. As the Court has made quite clear, the Constitution does not "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Rather, "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does

not significantly impinge on constitutionally protected rights." *Id.*

A contrary rule would jeopardize registration, in-person voting, voter list maintenance, and signature matches, all of which target dishonest voting, and all of which have some less "burdensome" alternative. Under Petitioners' theory, States may not take commonsense fraud-prevention measures without proving prior abuses of less secure, less burdensome alternatives. The Constitution does not so confine efforts to preserve and protect honest voting, particularly because the Elections Clause expressly vests *Congress* with responsibility for correcting States' overreaching.

1. Proof of fraud is not required to prevent fraud

Petitioners rely on cases invalidating substantive speech limits for the proposition that the State is required to prove the existence of rampant fraud before enacting a law to prevent fraud. ACLU Br. 49-51 & n.29; Dem.Br. 44. For starters, however, if the State's *prima facie* interest in fraud prevention can justify voter-identification laws only to the extent it can justify political-advocacy and solicitation restrictions, States could not even require voters to disclose their names. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invaliding anonymous-leafleting law).

The Voter ID Law is different because it does not regulate speech based on constitutionally protected content. Instead, it deters, on speech-neutral grounds, voter impersonation, which no one argues

is constitutionally protected. *Id.* at 344-46 (distinguishing lower scrutiny applied in *Storer* and *Anderson* because Ohio's anonymous-leafleting law was not a speech-neutral control of the mechanics of the election process). The Voter ID law enhances the integrity of elections and is entitled to greater deference than speech regulations because it affirmatively protects constitutional rights, just as the Constitution itself contemplates *should* happen.

On their own terms, moreover, many of the free-speech cases cited by Petitioners turn not on the State's failure to prove the existence of fraud or corruption, but on the lack of fit between the laws at issue and the menace to be prevented. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164-69 (2002); *Republican Party of Minn. v. White*, 536 U.S. 765, 776-77 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203-04 (1999); *McIntyre*, 514 U.S. at 349-53; *Edenfield v. Fane*, 507 U.S. 761, 767-69, 771-73 (1993); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-501 (1985); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 635-39 (1980).

In addition, even with respect to free-speech regulations, the Court has been clear that highly plausible justifications need not be proved. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("[T]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). The Court has required proof of need only in response to a

facially implausible justification, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231-32 (2003) (invalidating ban on contributions by minors), or in light of evidence concretely demonstrating harm to constitutional rights disproportionate to any apparent benefit, *Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479, 2496-2500 (2006) (invalidating contribution limits proven to be debilitating to parties and volunteers as well as candidates). Neither circumstance exists here.

The notion that elections need protection from fraud is hardly novel or debatable. *See* Part III.A.2., *infra*. The argument here is over how best to police a threat that everyone agrees exists. Where a regulation has such a plain connection to protecting the integrity of elections and guaranteeing the rights of legitimate voters, the government has no burden to prove any particular level of need. *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

2. History demonstrates that as society grows, more fraud-prevention measures are necessary

All significant voting regulations target fraud. For example, the Australian ballot—the secret, uniform, government-printed ballot known to American voters today—came into common usage in the United States in 1888 in response to rampant fraud. Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harv. J. on Legis. 167, 172-73 (1991). Before

that, voters cast color-coded ballots distributed by political parties, which enabled party bosses to observe whether individual voters had voted correctly. *Id*; *Burdick*, 504 U.S. at 446 (Kennedy, J., dissenting). The widespread adoption of voter-registration laws occurred in response to concerns that individuals would vote multiple times and vote in the names "of persons who had moved away or died, of persons not qualified to vote, of fictitious names, sometimes from fictitious addresses." Joseph P. Harris, *Registration of Voters in the United States* 5 (1929).

As American society has grown and changed, the need for election anti-fraud laws has only increased. Poll workers no longer know their neighbors and are under great pressure to keep lines moving to avoid deterring impatient voters. The need for better, yet still reasonable, fraud-prevention measures is self-evident. Computerized voting, electronic scanners, electronic poll books with signature exemplars for each voter, provisional ballots—each of these incremental advancements proceeds from the notion that modern society needs more secure elections.

There has never been a demand, however, that government prove some minimal quantum of fraud to take the next, reasonable step toward greater election security. If so, then proof would be necessary to sustain voter-registration laws and the Australian ballot, both of which impede some voters from casting votes as they wish. *Burdick*, 504 U.S. at 446 (Kennedy, J., dissenting). There is no defensible constitutional theory that existing security measures, whatever they may be, are

automatically permissible, but anything additional must be justified with proof of need in federal court.

B. The Indiana legislature had ample bases for enacting a new, more effective means of preventing in-person vote fraud

Even if the State must prove the need for the Voter ID Law, there is plenty of evidence from Indiana and across the country to justify it.

1. There is national evidence of in-person fraud, and Indiana has a troubling recent history of vote fraud generally

As the Seventh Circuit observed, the nature of in-person election fraud is such that it is nearly impossible to detect or investigate. Pet.App. 7-8. Without a photo-identification requirement, unless a voter stumbles across an impostor trying to use her identity, or an over-burdened poll worker happens to notice a deviation between signatures, officials will not detect in-person voter fraud. Pet.App. 7-8; J.A. 188-89. Yet, as the Carter-Baker Commission observed, "there is no doubt that it occurs," and no doubt that it dilutes the strength of legitimate votes and thereby disenfranchises honest voters. J.A. 138.

As recounted in the Statement, in recent years, Indiana has seen many cases of voter fraud of various types. Even if the Voter ID Law would not have prevented these particular instances of election fraud, the Indiana General Assembly had reason to worry that a culture of election fraud was spreading.

An appropriate response was to make elections more secure in many ways, such as by tightening restrictions on absentee voting and requiring photo identification at the polls.

In addition, the State is entitled to rely on the experiences of other jurisdictions when deciding issues of public policy, even when constitutionally protected rights are at stake. *Munro*, 479 U.S. at 195-96. There is ample evidence from across the nation that in-person vote fraud exists in contemporary society. Instances of deceased voters, double voters, and voters using fake names and addresses are all too common in American elections. State S.J.Br. Ex. 3 at 18-24; Ex. 4 at 2-7. Even Congress is convinced it happens. 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) ("By passage of this legislation, Congress has made a statement that vote fraud exists in this country.").

Moreover, a legislative decision to rely on such reports is not subject to judicial second-guessing. These are matters for legislative factual determination, not adjudication using minimum-proof standards. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *see also Nixon*, 528 U.S. at 402 (Breyer, J., concurring) ("[I]n the field of election regulation, the Court in practice defers to empirical legislative judgments . . . .").

2. Inflated voter-registration lists make Indiana particularly vulnerable to in-person vote fraud

Voter impersonation is a particularly acute concern in Indiana because the State's voter-

registration lists suffer inflation exceeding 40%, among the highest in the country. J.A. 177-78, 184. This presents a situation ripe for fraud that the State is entitled to prevent. Pet.App. 8-9, 109. The Petitioners argue that, rather than require photo identification to deter individuals from co-opting invalid registrations, the State should just do a better job maintaining voter-registration lists. Dem.Br. 52-53; ACLU Br. 57. This argument, however, both contravenes the Democrats' entire theory of the case and ignores the realistic limits of list-maintenance efforts.

a. To begin, the Democrats do not explain why the State has any better justification for purging voter lists than it does for requiring voters to present photo identification. Under the Democrats' theory, any election regulation predicated on deterring fraud that may have a disenfranchising effect on some voters is invalid unless the State proves actual occurrences of the type of fraud it seeks to prevent. Dem.Br. 42-45. Particularly in the wake of Motor-Voter, which curbed States' voter-list-maintenance efforts *precisely* over concerns about disenfranchising legitimate voters, there is little doubt that *any* list-maintenance efforts will potentially purge some legitimate voters. Accordingly, under the Democrats' theory, without documenting actual instances where impostors have used invalid registrations to vote, the State could not undertake even the voter-list maintenance efforts required by Motor-Voter.

Indeed, according to the Democrats' standards, the State's burden for purging registration lists should be all the greater because such efforts likely

pose disproportionate risks for minority and poor voters. Under Motor-Voter, whether a registration may be cancelled depends on whether a voter associated with that record actually votes. 42 U.S.C. § 1973gg-6(d). Minorities and the poor tend to vote in disproportionately smaller numbers, so it follows that even valid records for minority and poor voters likely will be cancelled in disproportionately larger numbers. S. Rep. No. 103-6 (1993), *available at* 1993 WL 54278, at *17-18 ("[M]any persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.").

Thus, ultimately, the Democrats do not advance a coherent constitutional theory, and certainly not one that would permit *any* efforts to protect legitimate voters from Indiana's inflated voter lists—at least not without proof of prior fraud. The Court has already rejected putting States in that position. *Munro*, 479 U.S. at 195-96; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.").

b. In addition, because of the need to avoid cancelling scads of valid, if dormant, registrations, list-maintenance efforts, even under the Consent Decree, do not offer a complete solution to list inflation. While efforts pursuant to the Consent Decree have resulted in more than 100,000 duplicate and decedent registration cancellations, this is a highly limited impact given the estimated 1.3 million invalid registrations. J.A. 177-78. None of the

remaining "inactive" registrations can be removed until after the November 2008 general election--and only then if (1) they are not used to vote in the meantime, and (2) local officials choose to remove them. And as the Seventh Circuit observed, even if the Consent Decree leads to substantial improvements, Indiana's voter-registration lists are only likely to become inflated again over time. Pet.App. 9.

Far from being "rectified," Dem.Br. 53, Indiana's inflated voter lists are likely to remain a problem into the future. The Voter ID Law remains necessary to prevent in-person fraud facilitated by existing and future list inflation.

3. The need to preserve public confidence in elections justifies the Voter ID Law

The Court has repeatedly confirmed that States have a compelling interest in protecting public confidence in the integrity and legitimacy of representative government. States have wide latitude to enact measures reasonably targeting the *perception* of corrupt elections. As the Court unanimously acknowledged in *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7 (2006), "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."

This interest is sufficient to justify substantial content-based impingements on political speech of federal-government employees. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973) ("[C]onfidence in the system of representative Government is not to be eroded to a disastrous extent."). And it justifies limiting large contributions to political campaigns. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (invoking "public awareness *of the opportunities for abuse* inherent in a regime of large individual financial contributions") (emphasis added); *see also McConnell*, 540 U.S. at 143 ("Of 'almost equal' importance has been the Government's interest in combating the appearance or perception of corruption . . ."); *Nat'l Right to Work Comm.*, 459 U.S. at 208 (acknowledging "the importance of preventing . . . the eroding of public confidence in the electoral process through the appearance of corruption").

Here, even more than in the political-campaign context, government is right to worry that confidence in the legitimacy of elections may erode based solely on "public awareness of the opportunities for abuse." *Buckley*, 424 U.S. at 27. Such opportunities are transparently obvious in elections without identification checks, particularly where there is high voter-list inflation. Regardless whether particular instances of fraud are well documented, "common sense," *McConnell*, 540 U.S. at 145, tells us that the General Assembly is entitled to be concerned that the combination of inflated voter rolls, lax security, and closely contested elections may erode voter confidence in election results.

In 2000, a Rasmussen poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. State S.J.Br. Ex. 22. A later Gallup Poll showed that 67% of adults nationally had only "some" or "very little" confidence in the way votes are cast. State S.J.Br. Ex. 23, at 8-9. Professor Hasen cites data showing that, since 2000, "a growing party and racial divide in public confidence in the fairness of the electoral process has emerged." Amicus Br. of Professor Hasen 10. Hasen has testified before Congress that more than 25% of Americans worried that the 2004 presidential vote was unfair. State S.J.Br. Ex. 24, at 1; *cf. Nixon*, 528 U.S. at 394 (noting that overwhelming public support can "attest[] to the perception" of the need to combat "'corruption and the appearance thereof'").

Public surveys and actions by at least half of the States and Congress to require *some* form of voter identification show an extraordinary consensus concerning the need for greater election security. Without it, the public may question the legitimacy of elections—close elections in particular. This is another compelling justification for the Indiana Voter ID Law.

C. Requiring identification already possessed by 99% of Indiana's VAP is the embodiment of "reasonable"

When it adopted the Voter ID Law, the Indiana General Assembly incorporated a simple, ordinary, dependable device that society has long accepted and adopted: government-issued photo identification already possessed by 99% of Indiana's VAP. This is a hallmark of reasonableness and narrow tailoring.

1. The General Assembly reasonably balanced cost, prevalence, and security

Photo identification is already required for many routine activities, such as flying, driving, cashing a check, staying in a hotel, purchasing alcohol, and renting a video. Pet.App. 3, 134; State S.J.Br. Exs. 31, 33-36. Even exercising some fundamental constitutional rights, such as getting married or entering courthouses, often requires photo identification. State S.J.Br. Exs. 33-36. In 2004, when Congress was debating whether to adopt a federal photo-identification standard, it recognized not only how the driver's license has become the "foundation of your identity," but also how "[t]he driver's license has come to represent more than authorization to operate a motor vehicle; it imparts a stamp of legitimacy and is often taken as unquestionable proof of identity." 150 Cong. Rec. H8664-02 (Oct. 7, 2004).

It is also a useful, uncomplicated tool for identifying individual voters. Prior election-security measures included a process for challenging voters and a signature-match requirement. J.A. 187-88. As the State's expert testified, however, the challenge procedure was typically used to verify residency, not identity, and the signature comparison required unrealistic poll-worker expertise and care. J.A. 187-88. Photo identification permits poll workers to check quickly the name on the list against the name on the card, and the face on the card with the face of the voter. J.A. 188.

Among all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity. The judiciary is ill-equipped to second-guess whether less secure forms of identification, such as utility bills and bank statements, would suffice. Congress and other States may have struck different balances, but the Indiana General Assembly is entitled to make its own legislative determinations in this regard.

2. The Voter ID Law includes reasonable safeguards to protect legitimate voters without identification

As mentioned, the Voter ID Law is structured in sensible ways (free identification, no application to absentee voters, accommodations for indigents and religious objectors) to minimize the risk of deterring legitimate voters without creating administrative problems or sacrificing election integrity. Beyond the specific exceptions noted, the Voter ID Law is reasonably drafted to prevent unwarranted disenfranchisement.

a. Voters who arrive at the polls without photo identification may cast provisional ballots and validate them within 10 days by presenting identification to the county clerk. Ind. Code § 3-11-8-25.2. If the ballot is rejected, the voter may initiate judicial review proceedings, with subsequent appeals available, to address fact disputes and statutory interpretation issues. Ind. Code § 3-6-5-34. Petitioners claim these safeguards are not enough, but their objections suggest nothing so much as

reflexive determination to oppose the Law at all turns.

The provisional-ballot validation process for indigents and religious objectors requires nothing more of the voter than to sign an affidavit at the county clerk's office within 10 days of an election. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5(c). It falls in line with the process for validating provisional ballots cast for other reasons, including uncertainty about precinct assignment or forgetting to bring identification. Requiring indigents and religious objectors to follow the same process only makes sense as a matter of ensuring smooth election administration.

More specifically, keeping poll workers out of the business of validating provisional ballots prevents delays at the polls. If election workers—a scarce resource in any election—must attend to the details of validating provisional ballots, voters may have to wait longer to vote. Nothing deters voting so much as long lines at the polls. Amicus Br. of Current & Former Sec'ys of State 22. Requiring indigents and religious objectors to validate their ballots at the clerk's office benefits the electorate as a whole.

Moreover, there is a way for indigents and religious objectors to make only *one* trip to vote. While the provisional-ballot law requires validation at the county clerk's office, it does not require validation *after* election day. Ind. Code § 3-11.7-5-2.5. This is important because in every Indiana county, all registered voters may cast their ballots at the county clerk's office starting 29 days prior to election day until noon the day prior to election day.

Ind. Code § 3-11-10-26(c). Photo identification is required, but indigents and religious objectors may, by voting early, cast a provisional ballot at the clerk's office and then validate it on the same trip to the same office by signing the appropriate affidavit. Here again, the Law accommodates those who may find compliance difficult.

b. Petitioners also discount the suitability of absentee voting as an alternative for seniors and individuals with disabilities. Absentee voting, they contend, is not a reasonable accommodation because (1) applying for an absentee ballot is itself burdensome; (2) absentee ballots may not arrive at the county election board by the deadline; and (3) absentee voters may miss influential events in the final days of a campaign. Dem.Br. 5-6.

Petitioners' complaints over the minutiae of voting absentee prove only that *all* voting systems burden voters. True, voters must apply for absentee ballots, but they can obtain applications via mail, telephone, fax, and internet. Ind. Code § 3-11-4-4; Ind. Sec'y of State, *Application for Absentee Ballot*. As for conveying one's ballot to the election board on time, Petitioners supply no evidence that this is a real problem. Those voting absentee by virtue of age or disability often will mail their ballots within their counties of residence, so delivery is unlikely to take more than a few days. Accordingly, such voters need not miss any significant phases of a campaign likely to change their minds.

Voting absentee is a reasonable accommodation likely to blunt any alleged disparate impact the Voter ID Law might have on the elderly and

disabled. *See* Milyo Study 1, 12-13 (documenting no statistically significant downturn in counties with larger populations of seniors). Besides, "[s]urely, at some point, the important interest of the State in protecting its entire electoral system outweighs a minor and incidental burden that happens to fall on a few uniquely situated citizens." *Kusper v. Pontikes*, 414 U.S. 51, 63-64 (1973) (Blackmun, J., dissenting).

c. Finally, the Voter ID Law is itself a safeguard against improper interference with voting rights. Before enactment of the Law, partisans stationed at polling places could challenge voters based only on suspicions about identity. Ind. Code § 3-11-8-27. Such challenges have prompted concerns about voter intimidation. ACLU S.J.Br. Ex. 14, at ¶¶ 6-10; Ex. 16, at 60-67. Under the Voter ID Law, all voters must carry photo identification that provides objective, on-the-spot confirmation of their right to vote that immediately refutes bad-faith challenges based on vaguely articulated suspicions. The system does not rely on partisan poll workers to vouch for their friends while leaving outsiders to fend for themselves—it treats all voters equally. In Indiana, even members of Congress must show proper identification to vote.

3. Indiana has acted to prevent absentee-ballot fraud with rules better targeted at that particular problem.

Petitioners insist the State is not truly interested in preventing voter fraud because the Law does not apply to mail-in absentee ballots. Dem.Br. 43-44;

ACLU Br. 47. First, it is false to say that Indiana has not addressed absentee-ballot fraud in recent years. The same year it enacted the Voter ID Law, the General Assembly limited absentee voting to those prevented from voting for the *entirety* of election day (in addition to those categorically entitled to vote absentee, such as the elderly and the disabled). Ind. Code § 3-11-10-24(a). Accordingly, the vast majority of voters are routed away from fraud-prone absentee balloting and toward in-person voting. The General Assembly also tightened restrictions on *handling* absentee ballots. Ind. Code § 3-11-10-24(c)-(d). This is important because much absentee-ballot fraud occurs when political bosses deliver ballots, "help" the voters, and then return them to the clerk's office. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145-46 (Ind. 2004).

As to the objection that the Voter ID Law does not apply to absentee voting, the answer is that it would not prevent mail-in absentee-ballot fraud, which typically occurs in a way not reasonably detectable by checking photo identification. Requiring voters to enclose a photocopy of photo identification plainly would not reveal the chief mode of absentee-ballot fraud: coercion of legitimate voters. *Id.* Photo identification would also be of little use in preventing voter impersonation. Pet.App.9-10. Obviously, the absence of a live body standing before election officials precludes linking the enclosed identification with the person actually casting the ballot. Pet.App. 10; J.A. 189-91.

Furthermore, while signature comparison yields little benefit at the polling place, it is very useful for absentee-ballot security. Officials have much more

time to compare signatures on ballot envelopes with signatures on voter-registration and absentee-ballot applications. J.A. 189-91. The difference in outcomes is significant. Witnesses with decades of combined experience working polling sites recall *no* instances where a signature was challenged at the polls. ACLU S.J.Br. Ex. 13, at 18; Ex. 17. at 25; J.A. 188. In contrast, a former Marion County election administrator has said that election officials routinely reject absentee ballots on suspicion of forgery. J.A. 190.

Absentee-ballot fraud self-evidently poses different problems than in-person fraud. The General Assembly is entitled to address those problems differently, if at all. *Bush v. Gore*, 531 U.S. 98, 143 (2000) (Ginsburg, J., dissenting) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969), for the proposition that "even in the context of the right to vote, the State is permitted to reform 'one step at a time'").

* * * *

Particularly given the expectations of modern society with respect to the need for photo identification generally, the Indiana Voter ID Law is a wholly unremarkable and overdue election-security regulation. If there is a case to be made that the Law goes too far by degrees, Congress can supersede Indiana using its Elections Clause authority, as Motor-Voter did with voter registration (which Congress made easier) and voter-record cancellation (which Congress made harder). Congress has enacted its own voter-identification law with HAVA, but it has conspicuously chosen *not* to override state

laws requiring photo identification. It follows that the Court should itself forbear and allow Indiana to exercise primary responsibility for regulating state and federal elections—accounting for "change in the situation" of the State—as the Founders envisioned.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

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RULE 29.6 DISCLOSURE STATEMENT

The corporate disclosure statement in Petitioners' Brief remains current and accurate.

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ARGUMENT

Indiana has enacted the most restrictive voter identification law in the nation. The State defends the law by arguing that petitioners lack standing to challenge it and that even a hypothetical risk of fraud is sufficient to justify the very real burdens that the law imposes on Indiana voters, many of whom cannot easily obtain the required voter identification. The State's arguments do not withstand scrutiny.

First, the petitioners have standing under this Court's well-established rules. Second, the State's effort to argue that a law burdening the right to vote need not be subject to heightened scrutiny unless it absolutely prohibits some minimum, yet undefined, number of voters from voting is inconsistent with this Court's repeated recognition that the right to vote may be burdened by barriers placed in the way of prospective voters as well as by absolute prohibitions. Moreover, because "[t]he right to vote is personal," *United States v. Bathgate*, 246 U.S. 220, 227 (1918), the focus ultimately must be on how individual voters are affected by the law. Third, Indiana's reliance on anecdotal evidence from other states merely highlights the lack of *any* evidence in this record of even a *single* case of voter impersonation at the polls in Indiana. Indeed, the anecdotal evidence that Indiana cites has been rejected by courts in the states in which the fraud allegedly occurred as well as by formal studies. Finally, the State's argument that it has virtual *carte blanche* to regulate in this area ignores this Court's clear statement that "[a] court

considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury . . . ' against 'the precise interests put forward by the State as justification for the burden imposed by its rule'" and that, in doing so, a court must take into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).[1]

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[1] The United States raises an additional argument that the petitioners' facial challenge is inappropriate under *United States v. Salerno*, 481 U.S. 739, 745 (1987), where this Court noted that in order for a statute to be declared unconstitutional on its face "the challenger must establish that no set of circumstances exists under which the Act would be valid." There is no constitutional application of a statute that imposes an unwarranted severe burden on the right to vote for some persons, even if other voters are not burdened. The residency requirement in *Dunn v. Blumstein*, 405 U.S. 330 (1972), for example, was unconstitutional on its face, even though it only applied to a small percentage of the potential electorate. Furthermore, to the extent that the law deters persons from voting and exercising a right found in, among other things, the First Amendment, *Salerno* does not preclude a facial challenge, *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). To require each person burdened by a poll tax, literacy test, white primary, durational requirement, or voter identification requirement to file a separate lawsuit would render the constitutional protection afforded voting illusory.

I. Petitioners have standing in this case

A. Crawford and Simpson have standing to assert the interests of their constituents and supporters

Since 1972 Petitioner William Crawford has represented in the Indiana House of Representatives what is arguably the most economically challenged district in the State; the district is home to many minority, elderly and poor persons. (District Court decision ["D.Ct."], Petitioners' Appendix to Petition for Writ of Certiorari ["Pet. App."] at 52; Crawford Dep. at 10-11, 21, 82, R.Doc. 65, Att. 17). Petitioner Joseph Simpson is an elected member of the Washington Township Board and an elected precinct committee-person. (Simpson Dep. at 12-13, 71; Interrog. ¶ 4, Ex. C, R.Doc. 64, Att. 16). Both men are candidates for reelection. (J.A. 80, 89). They brought this action for themselves and on behalf of the voters they represent. These include constituents who have informed Crawford at community events that they do not have the identification necessary to vote. (Crawford Dep. at 22, 80, R.Doc. 65, Att. 17; D.Ct., Pet. App. at 52; J.A. at 86). Simpson has personally observed that when voters are challenged some will walk away and not vote, and he has been informed by constituents that they object to the law. (D.Ct., Pet. App. at 53; Simpson Dep. at 34-43, 62-64, 79-80, R.Doc. 64, Att. 16). The State claims that the candidates lack standing because they cannot identify voters who would vote for them but for the challenged law. (State's Brief at 15). The State misconstrues the relevant law.

In *Powers v. Ohio*, 499 U.S. 400 (1991), this Court held that a criminal defendant has standing to assert the constitutional rights of jurors excluded by discriminatory peremptory challenges. Summarizing the rules of third-party standing, the Court said: "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, . . . the litigant must have a close relation to the third party, . . . and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411 (internal citations omitted).

The Court concluded in *Powers* that the discriminatory use of the peremptory challenges caused the defendant cognizable injury not because the jurors dismissed would have favored the defendant, but "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' . . . and places the fairness of a criminal proceeding in doubt." *Id.* at 1371. Similarly, it is not necessary to demonstrate that Crawford and Simpson will receive fewer votes because some of their constituents will be absolutely disfranchised by the new law or will be discouraged from voting by the challenge process. It is enough to show that unconstitutional burdens on the right to vote cast doubt on the integrity of the electoral process and place its fairness in doubt. The injury to the voter and the voting process is cognizable injury suffered by the candidates.

"[V]oters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Therefore, "[t]he right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Id.* Candidates and voters have the close relationship demanded by *Powers*. They are "inextricably bound up." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

In concluding that Crawford and Simpson had standing to assert the rights of voters who inadvertently cannot present photo identification at the polls (D.Ct., Pet. App. at 96), the trial court acknowledged voters would be hindered in their ability to protect their own interests. *See also Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (noting that political parties and unions have standing to raise their members' interests in a challenge to a provisional ballot regulation because the voters will not learn until they vote that they will encounter difficulties). The ability of these persons to vote provisionally does not provide a satisfactory method to protect their interests, for the provisional process itself may discourage a voter and the reality is that many provisional voters will not take the steps necessary to attempt to validate the ballot within ten days after the election. In *Powers* the Court recognized that "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate

his own rights." 499 U.S. at 415. That assessment applies with equal force here.

Given the close relationship between the voter and candidate, numerous courts have ruled that candidates have standing to represent the rights of voters and potential voters. *See, e.g.*, *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003) (noting that the candidate had standing not only because he had been threatened by prosecution but also because his supporters would be deterred by the challenged law); *Pennsylvania Psychiatric Society v. Green Springs Health Services, Inc.*, 280 F.3d 278, 288 n.10 (3rd Cir. 2002), *cert. denied*, 537 U.S. 881 (2002); *Walgren v. Bd. of Selectmen of the Town of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1975); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973).

B. The NAACP and United Senior Action have standing to raise the interests of their members

The representative of the Indianapolis Branch of the NAACP ("NAACP") testified that the organization has members who indicated that they would not be able to vote given the way the law was construed. (J.A. at 47). The organization did not have a list of the members without identification because it has a policy of preserving anonymity to encourage people to come forward with their complaints. (J.A. at 48).

An organization has standing to protect its members' rights where the members would have

standing, the interests being protected are germane to the organization's purposes and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). "The NAACP has a long history of protecting African Americans' voting rights." *NAACP Philadelphia Branch v. Ridge*, 2000 WL 1146619 at *2 (E.D.Pa. Aug. 14, 2000). The interests it seeks to protect in this suit are therefore "germane to its purpose," *id.*, and there is no need for individual members to participate in the litigation. "It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

United Senior Action ("USA"), a dues-paying membership organization, has members who do not have birth certificates or valid driver's licenses. (Neimier Dep. at 25, 69, Request 1, R.Doc. 62, Att. 7). As a result, it has "members who will not be able to vote or who will find impediments to voting in their way because of the challenged law." (Neimier Interrog. ¶ 6, R.Doc. 86, Ex. 64). Protecting the basic voting rights of its members is an essential part of USA's specific purpose "[t]o encourage the participation of senior citizens in our state and our local communities." (Neimier Dep., Request 1, R.Doc. 62, Att. 7). And, as with the NAACP, there is no need for participation of USA's individual members. USA also

satisfies the requirements of organizational standing.[2]

C. A number of the petitioners have standing under *Havens* because they are directly injured by the voter identification law

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), this Court held that a fair-housing organization had standing to challenge racial steering practices that impaired its "ability to provide counseling and referral services." In explaining its ruling the Court noted that "[s]uch concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constituted far more than simply a setback to the organization's abstract social interests." *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring) ("a private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed.").

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[2] It is true that neither organization provided the names of its members burdened by the law, but that fact alone is not an impediment to standing. "[U]nder Article III's established doctrines of representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought and we decline to create such a requirement." *Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999).

Based on this, the Seventh Circuit correctly found that the Democratic Party has standing because the law requires it "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law." (Pet. App. at 4). Similarly, the NAACP indicated that it would now have to use its limited time and membership resources to engage in educational and outreach efforts to inform the public about the law so as to protect voting rights. (J.A. at 289). These efforts will necessarily divert the NAACP from engaging in other activities and is further evidence of its standing in this case (*Id.*).

The Indianapolis Resource Center for Independent Living ("IRCIL"), which has a goal of removing barriers to voting at the polls by persons with disabilities, will now be required to use its limited resources to assist persons with disabilities in collecting the documentation necessary so that they will be able to vote. (J.A. at 283; Madill Dep. at 17-18, R.Doc. 62, Att. 9; D.Ct., Pet. App. at 55). In-person voting is an essential part of incorporating disabled persons into the community. (Madill Dep. at 75-76, R.Doc. 62, Att. 9). Concerned Clergy of Indianapolis, a membership civil rights organization dedicated and committed to assuring that persons are registered to vote, will also now be forced to expend its limited resources to assist persons in obtaining identification so they can vote. (J.A. at 287; D.Ct., Pet. App. at 54).

An organization has standing when it has "proven a 'drain on its resources' resulting from

counteracting the effects of" the law. *Association of Community for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (internal citation omitted). Regardless of any injuries to their members, the NAACP, IRCIL, and Concerned Clergy all have standing in this cause.

II. The Indiana law does impose a severe burden

A. The evidence demonstrates that the law burdens persons in effectively exercising their right to vote

The State repeats the argument that the law cannot be deemed to impose a severe burden because no voter has come forward and demonstrated that he or she was prevented from voting by the photo identification law. As a threshold matter, that assertion ignores the NAACP members who indicated they do not have the requisite identification as well as Representative Crawford's constituents who also do not have the appropriate identification. It ignores the homeless persons who are registered to vote but do not have either BMV identification or the necessary documents to procure the identification. (J.A. at 10-14, 15-19). It ignores persons like Therese Clemente who, in an effort to exercise her right to vote at the polls, made multiple fruitless trips to her local BMV in an effort to present the proper combination of documents in order to be able to vote. (J.A. at 92-95).

Furthermore, as the petitioners have stressed, the right to vote can be severely burdened by obstacles that fall short of absolutely preventing the person from exercising the franchise. (Petitioners' Brief at 35-36). Respondent Marion County Election Board notes in its Brief (at 9) that during the most recent election in Marion County thirty-four persons were forced to vote by provisional ballot because of a failure to have appropriate identification. Only two returned within the designated time period so that thirty-two registered voters, many of whom had voted in numerous prior elections, did not have their votes counted. In Muncie, Indiana, at the conclusion of the most recent election day, the mayoral election was only nine votes apart with fourteen provisional ballots and five contested absentee ballots outstanding. Nick Werner, *Question of who won race for Muncie mayor might be answered today*, THE STARPRESS.COM, http://www.thestarpress.com/apps/pbcs.dll/article?AID=/20071116/NEWS01/71116033. Not all the provisional voters came to the clerk's office within the ten-day period so their votes went uncounted in the final total. *Ballot Count Ups Lead to 11 Votes in Muncie Mayoral Race*, WSBT 22, http://www.wsbt.com/news/indiana/11481896.html.

All of the provisional voters had obstacles placed in their way, obstacles created by the voter identification law, which ultimately caused many of them not to vote, although they had showed up at the polls on election day and attempted to do so. For these registered voters who went to the polls, many of them as

they had done for years, and did not ultimately succeed in casting their ballot, their right to vote was severely burdened by "state-imposed obstacles impairing voters in the exercise of their choices." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986).

B. A significant number of persons are adversely affected

The State argues that even if some voters are burdened by the voter identification law, the number is not great. As this Court has consistently stressed, however, "[t]he right to vote is personal." *Bathgate*, 246 U.S. at 227. And, the right is impinged upon when any one individual voter is "shortchanged." *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989).

The voter identification law does more than "shortchange" a very small number of voters and potential voters. The State seizes on the figure of 43,000 Indiana voting age residents without BMV identification or licenses, representing 1% of Indiana's voting age population. This number was the product of calculations by the district court which conceded that its methodology was neither "complete [n]or definitive." (D.Ct., Pet. App. at 69-70, n.43). Even this number is hardly negligible. However it ignores national studies demonstrating that from 6% to 11% of the American electorate is without official state identification. (Petitioners' Brief at 39-40). It ignores a recent study that specifically surveyed

Indiana voters in October of 2007 and found that approximately 16% of all voting eligible residents did not have either a current license or state identification card and 13% of current registered voters did not have licenses or identification cards. Matt A. Barreto, Stephan A. Nuño, Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, WORKING PAPER – WASHINGTON INSTITUTE FOR THE STUDY OF ETHNICITY AND RACE Tables 1.1, 1.2 (Nov. 8, 2007), http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf ("*Disproportionate Impact*"). The number of persons burdened by the law is significant.

C. The voter identification law is burdensome on particular groups

The State argues at length that the voter identification law does not adversely affect particular groups. In doing so it relies extensively on a recent study that seeks to divine information from a comparison of voter turnout in Indiana in the 2002 and 2006 general elections. Jeffrey Milyo, *The Effects of Photographic Indentification (sic) on Voter Turnout in Indiana: A County Level Analysis,* INSTITUTE OF PUBLIC POLICY, http://truman.missouri.edu/ipp/policyareas/?RAID=40. Milyo uses the fact that in-person voter turnout increased about 2% in the latter election as a springboard for his analysis. Obviously, the increase in turnout could have been a product of numerous factors not accounted for by Milyo ranging from high-profile elections to more favorable weather conditions. To the

extent Milyo rests his conclusions on the rise in the rate of voting, they founder on the fact that the number of voters declined between the Indiana primaries of 2003 and 2007, where the voter identification law was in effect for only the latter election.[3] The same pattern repeated itself in the general election in Marion County in November of 2003 and 2007.[4] It is unwise to attribute the 2% increase that Milyo discovered to what he describes as the law's beneficial effects. There are too many unaccounted variables and Milyo's study is not useful.

What is useful is to survey voters and prospective voters. The October, 2007 survey, *Disproportionate Impact*, confirms that "minority, low-income, and less educated Indiana residents are less likely to have access to valid photo identification." *Id.* at 15. The rate of access to identification peaks in the 55-69 age group, and drops significantly among those aged 70 or above. (*Id.*, Figure 2). This is consistent with the

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[3] In the May 2003 primary 9% of Indiana registered voters participated, including 334,205 in-person voters. Indiana Secretary of State, *Selected Voter Registration and Turnout Statistics*, 1948-2004, http://www.in.gov/sos/elections/elections/index.html. In the May 2007 primary 8% of registered voters participated, including only 281,593 in-person voters. *Id.*

[4] In the 2003 general election in Marion County voter turnout was 26.81% of registered voters. Marion County Clerk's Office-Election Board, *Voter Turnout*, http://www.indygov.org/eGov/County/Clerk/Election/Election_Info/voter_turnout.htm. In 2007 the turnout was 26.32%. Marion County Clerk, *2007 General Election, Certified Results*, http://imcwwa2k3.indygov.org/elecnight/2007gen/.

record. (Petitioners' Brief at 13). It alone does not necessarily demonstrate an equal protection violation, but it is "especially difficult for the State to justify." *Anderson*, 460 U.S. at 793.

At a minimum, the voter identification statute incontestably imposes a severe burden on the ability of some persons to vote. Regardless of their age, race, or income status, the Indiana voters whose provisional votes were not counted this November, or the registered voters who did not wait for the challenge process but left the polls without voting, or who did not vote because they did not have the requisite identification, or the citizens who did not register to vote because they knew they would not be able to vote, all have had their right to vote burdened. The law imposes a severe burden because it burdens the right to vote of individuals. "The personal right to vote is a value in itself." *Morris*, 489 U.S. at 698.

D. The Indiana law imposes uniquely onerous burdens

The State describes Indiana's law as within the mainstream in America. However Indiana's statute is uniquely burdensome. (Petitioners' Brief at n.14-15).[5]

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[5] Footnote 15 of the Brief describes the signature match that suffices to count a provisional ballot under Arizona law if photo identification or two pieces of non-photo identification are presented and a question is raised as to adequacy of the identification presented. If no identification or only one form of non-photo identification is presented, the person's "conditional

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Only Georgia, whose statute is currently under judicial review, also requires that photo identification must be provided if the in-person voter is to be able to cast a non-provisional ballot, and in Georgia anyone who presents voter registration will be issued photo identification. (*Id.*). In Indiana, the Byzantine requirements imposed on persons attempting to obtain identification from the BMV often leave individuals unable to procure the necessary identification documents to vote. *See, e.g.*, J.A. at 215, 220-21 (deposition testimony of BMV employee noting that in a given week 60% of applicants for licenses or state identification cards are turned away because they fail to have the appropriate documents mandated by the BMV). Indiana's requirement is extremely onerous and it stands alone in the United States. This is a constitutional "danger sign." *Randall v. Sorrell*, ___ U.S. ___, 126 S.Ct. 2479, 2494 (2006) (plurality opinion) (noting that Vermont's contribution limits are the lowest in the country).

The State argues that BMV identification is, or should be, possessed by all inasmuch as it is the "global standard" for identification, and therefore Indiana cannot be faulted for adopting this standard. (State's Brief at 29-30). Although it may be more

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provisional" ballot will not count unless he produces proper identification, which may be a utility bill, to the county recorder within three or five days. *Procedure for Proof of Identification at the Polls,* http://www.azsos.gov/election/Prop_200/PROOF_OF_IDENTIFICATION_AT_POLLS_PROCEDURE.pdf.

convenient to possess photo identification, it is not a necessity.[6] The reality, a reality not denied by the State, is that many Indiana residents do not have the required identification and it may be extremely difficult to obtain. These people may have difficulty in renting a video (State's Brief at 30), but that is not, and should not be, the constitutional measure for preserving the right to vote. That those without identification do not measure up to the State's view of 21st Century Americans does not alter the fact that it may be extremely burdensome, if not impossible, for some to obtain the identification.

The State seeks to deflect this point by arguing that obtaining identification is no more inconvenient than registering to vote in the first place. To the extent that the State is arguing that if registration is constitutional, photo identification must be as well, the State's argument is misplaced. The unconstitutionality of the voter identification law stems from the fact that *this* particular burden is not justified by the State's interests and the law is not tailored to meet any legitimate interest. *Burdick*, 504 U.S. at 434. The same is not true for registration requirements.

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[6] For example, it is not currently necessary that a person present state or federal issued identification to fly or to enter all federal courthouses. (*See Amicus* brief of Cyber Privacy Project, *et al.* at 35-36.) Indiana will issue a marriage license without photo identification. IND. CODE § 31-11-4-6. Checks can be cashed without photo identification. Anita Hamilton, *Profiting from the Unbanked* (Aug. 16, 2007), TIME.COM, http://www.time.com/time/magazine/article/0,9171,1653666,00.html.

To the extent that the State is arguing that it is no more burdensome to register to vote than it is to obtain identification, it is mistaken. In order to register to vote no identification needs to be produced; instead a simple form must be completed and submitted at numerous venues or by mail. IND. CODE §§ 3-7-13-1 through 3-7-24-17; Indiana Election Commission, *Indiana Voter Registration Application (VRG-7)*, http://www.in.gov/sos/elections/pdfs/50504.pdf. There is no comparison with the laborious process that voters without identification must go through so that they can gird themselves with the necessary documentation to be able to approach the BMV with a realistic hope of leaving with the elusive identification card. A person born in Marion County who needs to obtain a birth certificate may not be able to obtain the birth certificate from the Marion County Health Department without producing the license or state identification that she is attempting to procure by obtaining the birth certificate. (Ullrich Aff. ¶ 6 and attachments, R.Doc. 62, Att. 11). While this may not fit the text-book definition of "Hobson's choice" (State's Brief at 28), it is obviously a Catch-22 of classic proportions and "imposes a substantial burden on voter choice." *Burdick*, 504 U.S. at 444 (Kennedy, J., dissenting).[7]

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[7] Licenses and identification cards issued before January 1, 2006, are valid for four years. IND. CODE §§ 9-24-12-1, 9-24-16-4. Thereafter, they are valid for six years. *Id.* Although a birth certificate will not have to be shown in order to obtain renewal, a license renewal applicant with a new address "will need to provide a computer-generated document such as a utility bill or

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III. There is no factual support for the State's concern that Indiana may experience in-person voter impersonation fraud

According to the State, the factual basis for the voter identification law is the risk Indiana faces from in-person voter identification fraud. Given that, the following uncontested facts bear repeating:

- The State has not identified even a single instance of voter impersonation fraud occurring at the polls in the history of Indiana. (D.Ct., Pet. App. 39).
- No Indiana voter has ever been charged with any crime relating to impersonation fraud in in-person voting. (*Id.*).
- No evidence of in-person impersonation fraud was presented to the Indiana legislature when it was considering the challenged legislation. (*Id.*).
- No such evidence was presented in this litigation.

The State argues that Indiana can rely on "credible nationwide reports" of such fraud. (State's Brief at 2-3). However, the largely anecdotal tales of fraud

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pay-check stub that contains your name and a new address." Indiana Bureau of Motor Vehicles, *Renewing a Driver's License*, http://www.state.in.us/bmv/3476.htm. And a person seeking to renew his identification card who has moved will have to satisfy the proof of residency requirements imposed at the time of initial application. Indiana Bureau of Motor Vehicles, *Identification Requirements*, http://www.state.in.us/bmv/3470.htm.

cited by the State have either been rejected by judicial findings, repudiated by state officials, or discredited by subsequent studies. For example, the State cites to reports of voter fraud in Missouri. However, the Missouri Supreme Court concluded in October of 2006 that the credible evidence from multiple election officials was that "voter impersonation fraud is not a problem in Missouri," *Weinschenk v. Missouri*, 203 S.W.3d 201, 210 (Mo. 2006), and struck down the state's voter identification law under the Missouri Constitution. *See also* Brief of *Amici Curiae* the Brennan Center, *et al.*, at 15-16.

Indiana also seeks support for its voter identification law from what it describes as evidence of massive vote fraud in Washington's 2004 gubernatorial election. (State's Brief at 2-3). But whatever the scope of that vote fraud may have been, it did not involve voter impersonation at the polls. (R.Doc. 79, Ex. 2 at 19).[8] The fact that felons may have improperly voted in Washington, or provisional ballots may have been improperly counted, does not support Indiana's need for a voter identification law purportedly designed to address a problem – voter impersonation at

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[8] A trial court found that 1,678 illegal votes had been cast. (R.Doc. 79, Ex. 2 at 19). However, the majority were those of felons voting improperly and provisional ballots being improperly counted. (*Id.*). The limited anecdotal examples of deceased persons voting appeared to involve primarily absentee balloting, not in-person voting. (R.Doc. 83, Ex. 15).

the polls – that does not seem to have occurred in either Indiana or Washington.

The State refers to a preliminary report concerning the 2004 elections in Milwaukee County, Wisconsin but fails to mention that there is no reference in the preliminary findings to any alleged in-person impersonation fraud. (R.Doc 79, Ex. 4). That is because the problem in Milwaukee County, like that in Washington State, had nothing to do with voter impersonation at the polls. After numerous investigations and reports, the primary problem turned out to be with miscast votes by former felons, many of whom had never been informed that they had lost their right to vote. Lorraine C. Minnite, *The Politics of Voter Fraud* 35 (2007), http://www.bradblog.com/Docs/PoliticsofVoterFraudFinal.pdf. Indiana's reliance on a 2000 newspaper article that ballots had been cast in Georgia in the names of deceased voters (R.Doc. 83, Ex. 12), is equally unhelpful because it ignores the far more relevant fact, noted in a federal district court decision, that the Georgia Secretary of State had "pointed out that, to her knowledge, the State had not experienced one complaint of in-person fraudulent voting during her tenure." *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1361 (N.D. Ga. 2006).

Although the Carter-Baker Commission did recommend that photo identification be used in elections as of 2010, it presented no facts to support any conclusion that in-person impersonation fraud in the United States is an actual problem, but instead recycled some of the reports relied on by the

State. Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, Sec. 2.5 (Sept. 2005), http://www.american.edu/ia/cfer/report/report.html. Significantly, both President Carter and Secretary of State Baker later condemned Georgia's voter identification statute as "discriminatory" and "too costly or difficult" and noted that states must aggressively seek out the "12 percent of citizens who lack a driver's license" to assure that all have identification. (R.Doc. 104, Ex. 18).

The utter lack of in-person impersonation fraud is apparent in the United States Department of Justice report discussing voting integrity and mentioned by the State (R.Doc. 79, Ex. 2). It contains no reference to in-person impersonation fraud. A subsequent "Fact Sheet" issued by the Department of Justice in July of 2006 reports that 86 individuals have been convicted of ballot fraud offenses; but there is absolutely no mention of any in-person impersonation fraud. Department of Justice, *Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative* (July 26, 2006), http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html.

Anecdotal reports of in-person impersonation fraud are not supported by facts and do not withstand scrutiny. This is the ultimate conclusion drawn by the United States Election Commission, which found that many of the allegations of voter fraud that have been repeated as fact "were not substantiated. . . . Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud. . . ."

United States Election Assistance Commission, *Election Crimes: An Initial Review and Recommendation for Future Study* 16 (Dec. 2006), http://graphics8.nytimes.com/packages/pdf/national/20070411voters_final_report.pdf. The Commission further found that "impersonation of voters is probably the least frequent type of fraud." *Id.* at 9.

IV. The precise interests put forward by the State do not justify the burdens imposed by the voter identification law and it is not narrowly drawn to meet the State's asserted interests

A. The precise interests advanced by the State do not justify the law

Prominently absent from the State's articulation of the proper standard to be applied to the voter identification law is this Court's instruction that a court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. "In passing judgment, the Court must . . . determine the legitimacy and strength" of the interests. *Id.* Even if the burden on voting rights is less than severe, a law must fail if it is not justified by the state's precise interests. *See, e.g., Reform Party of Allegheny Co. v. Allegheny Co. Dep't of Elections*, 174 F.3d 305, 318 (3rd Cir. 1999) (*en banc*) (defendant failed to offer "'important' or 'sufficiently weighty' state interests that justify, even under intermediate scrutiny" the burdens imposed by the challenged law.)

Instead, the State seeks to recast these requirements to provide that there is no need to demonstrate justification for its precise interests absent a facially implausible justification or absent evidence concretely demonstrating harm to constitutional rights that is disproportionate to any apparent benefit. (State's Brief at 47). Implausibility and lack of proportionality cannot be determined until after the Court reviews the evidence to determine the legitimacy and strength of the proffered justifications. The reason that the contribution ban was struck down in *McConnell v. FEC*, 540 U.S. 93, 232 (2003), was not because the justification was deemed to be facially implausible, but because, after reviewing the government's "scant evidence" the Court concluded that the evidence did not support the precise interests advanced by the government. There was not a "convincing case of the claimed evil." *Id.* Similarly, in *Sorrell*, 126 S.Ct. at 2494, the Court formed no conclusion until after it "examine[d] the record independently and carefully to determine whether . . . [the] contribution limits are 'closely drawn' to match the State's interests." And in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390-91 (2000), the Court did not abandon the factual inquiry but relied on evidence of potentially corrupting contributions that had been adduced during the course of *Buckley v. Valeo*, 424 U.S. 1 (1976).

Here, there is "scant evidence" to support the State's justification for the burdens imposed by the voter identification law. The primary precise interest

put forward by the State is the need to prevent in-person impersonation fraud. However, there is no evidence in Indiana of such fraud and, despite the State's protestations to the contrary, there is no credible evidence that this is a problem anywhere in the United States. *See* Section III, *supra*.

The State attempts to bolster the legitimacy of its fraud concern by arguing that the law requiring voter identification for *in-person* voting is a response to the "culture" of election fraud in Indiana that was occasioned by *absentee* ballot fraud. Such an imprecise response is inconsistent with *Burdick* and *Anderson*. Indeed, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995), this Court noted that Ohio could not punish fraud indirectly by "indiscriminately" prohibiting all anonymous election-related speech. Indiana's response, also in the name of fraud prevention, is similarly indiscriminate.

Nor is the strength of the State's argument that the voter identification law is necessary to prevent fraud enhanced by its claims that the State's inflated voter registration lists make Indiana particularly prone to in-person voting fraud. The State does not deny that this is a problem of its own making and that federal law requires voter list maintenance, 42 U.S.C. § 1973gg-6, but argues that it cannot solve the problem it created until at least after the November 2008 election, and therefore extra fraud protections are necessary. Yet, by virtue of the consent decree it signed with the United States (J.A. at 299-306), Indiana has agreed to, among other things: distribute

notices so that county offices can identify and remove duplicate registrations as well as the names of deceased registrants; conduct a statewide mailing to identify ineligible voters; and, develop a written plan for identifying and deleting ineligible voters on the State's computerized database. Indiana is now sufficiently confident to announce that its new Statewide Voter Registration System, which creates a single database that links all Indiana's voter registration records, will "fight election fraud by keeping the voter rolls current and accurate." State of Indiana, *Statewide Voter Registration System*, http://www.indianavoters.com/PublicSite/PublicHome.aspx?AspxAutoDetectCookieSupport=1. Even if the Constitution could tolerate the imposition of a burden on voters to correct the State's prior failures, there is "scant evidence" that formerly bloated voter registration laws support the need for the law.

The State argues that the secondary interest supporting the law is the need to preserve public confidence in the electoral process. Bereft of any specific evidence that the public is concerned about the sole type of election fraud that the State has chosen to address, in-person impersonation fraud, the State argues that "common sense" validates Indiana's concern. (State's Brief at 54). The State cites *McConnell* for this proposition, but omits the fact that the Court noted there that Congress' belief in the corruptive aspects of soft-money contribution was supported by "[b]oth common sense and the ample record." 540 U.S. at 145. Here there is no record, ample or otherwise, to

support the State's supposition. It is equally likely that the electorate's confidence is negatively impacted by laws like Indiana's that are perceived as burdening the ability to vote of portions of Indiana's citizenry. To the extent that there is a public perception of in-person impersonation fraud, it is most obviously a misperception which cannot be a legitimate or strong interest that warrants burdening the right to vote.

B. The State's interests can be met in a much more tailored fashion

The State argues that the voter identification law is reasonable. It certainly is not. It is a solution to a problem that simply does not exist and it is a solution that imposes serious burdens on the voting rights of Indiana residents. Even assuming that Indiana could legislate to fight this non-existent problem, its response certainly is not tailored in any respect.

The State argues that courts are ill equipped to review its chosen method of voter identification. However, it is hardly an act of judicial legislation for this Court to take note of the fact that Indiana's response is far outside of the identification requirements established by the forty-nine other states as well as by Congress through HAVA, 42 U.S.C. § 15483.[9] This is a "danger sign" that indicates that

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[9] The United States refers to HAVA requiring voters to provide identification. (*Amicus* Brief at 2). As Petitioners have

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the identification law is not "'closely drawn' to match the State's interests." *Sorrell*, 126 S.Ct. at 2494. Indiana has eschewed various other forms of identification, instead selecting one particular form of identification that is burdensome for some persons to obtain. This fails any level of scrutiny that demands tailoring.

In *Dunn*, 405 U.S. at 353, this Court concluded that existing criminal sanctions were adequate to prevent fraud. The State does not respond to the argument that Indiana's criminal sanctions are similarly sufficient, but argues that one of the additional anti-fraud mechanisms in place before the voter-identification law, signature comparison, was not effective. Its rationale is that it must have been ineffective because no one was ever caught. This is pretzel logic. In its Brief (at 6, 10) Respondent Marion County Election Board describes the signature comparison as one of the "time-tested" fraud prevention mechanisms that were in place before the voter identification law, contributing to the fact that the

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noted (Brief n.1), HAVA requires disclosure of a driver's license number or the last four digits of a social security number. 42 U.S.C. § 15483(a)(5)(A). Once Indiana is fully compliant with HAVA, the only persons who will have to provide documentation to vote will be those who register by mail and who do not produce a driver's license number or the last four digits of the social security number, or if those numbers cannot be matched when compared to a state data base. 42 U.S.C. § 15483 (a)(5)(A), (b) Even then, utility bills and other non-photographic documentation will suffice and the documentation will only have to be produced once. 42 U.S.C. § 15483(b).

Board "has neither any memory nor any record of any instance of the in-person voter impersonation fraud the Voter Identification Statute is designed to combat." This is the definitive answer on the adequacy of signature comparison.

The State recognizes that absentee balloting in Indiana presents a serious challenge to its assertion that the voter identification law is narrowly tailored in that the sole fraud mechanism with regard to absentee balloting is signature comparison and the State did not see fit in the course of passing the law to impose any additional identification requirements with regard to absentee voting – the only area where fraud has occurred in Indiana. With regard to the latter point, the State argues that to combat absentee ballot fraud it has enacted statutory changes designed to tighten the requirements for absentee voting in Indiana, citing the former law that allowed persons to vote absentee who "will be absent from the county on election day," IND. CODE § 3-11-10-24 (amended eff. July 1, 2005), as opposed to the current law that allows persons to vote absentee who have "a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open." IND. CODE § 3-11-10-24. It is not immediately apparent what this statutory change means given that it has had no negative effect on absentee voting in Indiana. For example, the percentage of persons voting absentee has been as follows: 2007 Primary – 17%; 2006 General Election – 10%; 2006 Primary – 7%; 2004 General

Election – 10%; 2004 Primary – 6%. Indiana Secretary of State, *Selected Voter Registration and Turnout Statistics, 1948-2004*, http://www.in.gov/sos/elections/elections/index.html. The other change to Indiana law only applies where a voter's household member or attorney in fact personally delivers the sealed envelope concerning the absentee ballot and only requires the signing of an affidavit. IND. CODE § 3-11-10-24(c), (d). The State has not altered the fraud prevention mechanisms for absentee balloting by mail, the area of fraud present in Indiana. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145 (Ind. 2004). Rather than draw the law narrowly to address the only type of voting fraud that exists in Indiana, the State focuses its attention solely on in-person voting, abandoning the anti-fraud mechanisms that served Indiana well. The law is not appropriately tailored.

Perhaps the most glaring example of the lack of tailoring of Indiana's scheme is the fact that if voters cannot afford the underlying documentation for the identification, or have religious objections to being photographed, they cannot appear at the polls on election day and sign an affidavit and vote, but must instead vote via a provisional ballot and then go to a remote government office on another day and sign the appropriate affidavit. IND. CODE § 3-11.7-5-2.5(c)(2). The State responds that allowing voters to execute affidavits at the polls would cause delays. The State does not explain why having the prospective voter check a box that he or she is indigent or has a religious objection would cause further delay inasmuch

as under the current system the person must already sign an affidavit in order to vote provisionally. IND. CODE § 3-11-8-25.1(d). The State notes that the indigent or religious objector voter who plans ahead can vote at the absentee voter board in the office of the circuit court clerk up to the date before the election and then, when challenged, vote via a provisional ballot and then fill out the affidavit on the same day. IND. CODE § 3-11-10-26. This added procedure, which requires that the person travel to a remote site in advance of the election, provides no consolation to the voter who shows up at the polls expecting to vote and certainly does not respond to the objection that a tailored approach, adopted by a number of states, would assist that voter by allowing him to sign the affidavit at the polls and cast a regular ballot. *See* Brief of Petitioners n.14.

Indiana's response to its fraud concerns is not narrowly tailored to address those concerns. Its approach places artificial barriers in front of prospective voters and the law is unconstitutional.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Nos. 07-21 and 07-25

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in person produce a government-issued photo identification on its face violates the First and Fourteenth Amendments to the Constitution.

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INTEREST OF THE UNITED STATES

This case concerns a facial challenge to a state law that requires those who vote in person in federal elections to present a government-issued photo identification and, more generally, the appropriate constitutional standard for reviewing such a law. Congress has enacted numerous requirements, including registration and identification requirements, designed to "increase

the number of eligible citizens who register to vote" while simultaneously "protect[ing] the integrity of the electoral process." 42 U.S.C. 1973gg(b)(1), (3). In 2002, Congress enacted the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (42 U.S.C. 15301 *et seq.*), to establish and modernize various minimum election administration standards for federal elections. Among other things, HAVA requires voters to provide proof of identification before registering or casting their first ballot, see 42 U.S.C. 15483(a)(5)(A), (b)(2)(A), (3)(A). The Attorney General is responsible for enforcing those provisions. 42 U.S.C. 1973gg-9, 15511. The Attorney General also has authority to prosecute voter fraud in federal elections. See, *e.g.*, 42 U.S.C. 1973i(c), (e), 1973gg-10(c).

STATEMENT

1. In 1993, Congress enacted the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.* One of the Act's purposes was to "increase the number of eligible citizens who register to vote." 42 U.S.C. 1973gg(b)(1). The NVRA facilitated voter registration by, among other things, requiring that state motor vehicle driver's license applications also serve as voter registration applications. 42 U.S.C. 1973gg-3(a)(1). At the same time, Congress emphasized the need to "protect the integrity of the electoral process." 42 U.S.C. 1973gg(b)(3). Thus, the NVRA authorizes States to require information necessary to "assess the eligibility of the applicant." 42 U.S.C. 1973gg-3(c)(2)(B)(ii), 1973gg-7(b)(1). The Act also specifies that States may require individuals who have submitted their voter registration by mail "to vote in person" the first time they vote. 42 U.S.C. 1973gg-4(c)(1)(A), (B).

In 2002, Congress enacted HAVA. HAVA requires States to maintain accurate statewide voter registration lists, by making a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 42 U.S.C. 15483(a)(4)(A). In addition, HAVA requires States to verify the voter registration information of new registrants. 42 U.S.C. 15483(a)(5)(A), (b)(1)-(4). A State must require a person who submits a voter registration by mail to submit, either as part of the registration or the first time the individual votes, proof of identity. *Ibid.* Acceptable forms of identification under HAVA are "a current and valid photo identification" or "a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter." 42 U.S.C. 15483(b)(2)(A), (3)(A). HAVA specifies that States may establish "more strict" standards that are not inconsistent with the federal law's "minimum requirements," 42 U.S.C. 15484.

2. Indiana determined that it faced a serious problem of actual and potential election fraud. In 2004, the Indiana Supreme Court invalidated the 2003 East Chicago mayoral primary based on evidence of rampant absentee-ballot fraud, which included the use of vacant lot or former addresses and casting of ballots by nonresidents. *Pabey* v. *Pastrick*, 816 N.E.2d 1138, 1145, 1153. The Indiana Supreme Court found that the widespread fraud had rendered the election results "inherently deceptive and unreliable." *Id.* at 1151.

At the same time, the State was experiencing highly inflated voter registration rolls, thus creating a risk of further voter fraud. Indeed, a report shows that more than 35,000 deceased individuals were on the rolls statewide, and that, in 2004, the list of registered voters was

inflated by some 41%, including well over 200,000 duplicate voter registrations. 07-21 Pet. App. 40 (Pet. App.). On April 7, 2005, the United States Department of Justice informed the Indiana Secretary of State that numerous counties had registration totals that exceeded their voting age populations and noted the State's obligations under federal law to maintain accurate voter registration lists. J.A. 312-313.[1]

Shortly thereafter, Indiana responded to those and other concerns by enacting a number of election reforms. In particular, Indiana enacted Senate Enrolled Act No. 483 (Voter ID Law), Ind. Pub. L. No. 109-2005, 2005 Ind. Acts 2005, which, in order to deter voter fraud, requires those who vote in-person to present photo identification, issued either by the United States or Indiana. See Ind. Code 3-11-8-25.1(c) and 3-5-2-40.5; Pet. App. 106. On the same day, the legislature also placed new restrictions on absentee voting and the handling of absentee ballots. Ind. Pub. L. No. 103-2005 § 4, 2005 Ind. Acts 1948; Ind. Code 3-11-4-2(c), (d).

Under the Voter ID Law, an acceptable ID must contain the photograph and name of the individual to whom it was issued, which must conform to that on the registration rolls. The ID must also have an expiration date and be either unexpired or have expired after the most recent general election. See Ind. Code. 3-5-2-40.5. Numerous forms of identification may qualify, including an Indiana driver's license, a non-license photo identification issued by the State's Bureau of Motor Vehicles (BMV), a student ID issued by a State-sponsored college

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[1] The United States Department of Justice brought suit against the State for violating the NVRA's requirements regarding the removal of ineligible voters from the voter registration list. J.A. 309-317. That suit was resolved through a consent decree. J.A. 299-307.

or university, a passport, or military ID. See Dale Simmons and Cody Kendall, co-counsels, Indiana Election Division, *Photo ID Interpretations* 3-4 (2006) (*Photo ID Interpretations*) <www.in.gov/sos/elections/pdfs/PhotoIDAdvisory_4_30_06.pdf>.

Indiana provides alternatives for those who do not already possess an acceptable ID. The State will provide, free of charge, a photo ID that satisfies the requirements to any individual who will be at least 18 years of age at the next election and does not have a valid Indiana driver's license. See Ind. Code 9-24-16-10(b). To obtain a photo ID, the BMV requires first-time applicants to produce one primary document (such as a certified birth certificate or certain immigration documents), one secondary document (such as non-photo government documents, bank statements, school documents, or credit card statements), and one proof of Indiana residency; or two primary documents and one proof of Indiana residency. Pet. App. 32-35.

For certain voters, state law provides ways for those individuals to vote without producing photo identification. Those who are over 65, disabled, or confined by illness or injury may cast an absentee ballot by mail. See Ind. Code 3-11-10-24(a)(3)-(5). Indiana's photo ID law does not apply to absentee balloting by mail. See *id.* 3-10-1-7.2, 3-11-8-25.1; Pet. App. 25.[2] The Voter ID Law also does not apply to individuals "who vote in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code. 3-11-8-25.1(e). See Pet. App. 25.

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[2] A voter casting an absentee ballot by mail the first time that person votes after having registered to vote by mail may be required to present identification pursuant to HAVA. See 42 U.S.C. 15483(b).

Those who object to having their pictures taken on religious grounds or do not have and cannot afford to obtain the necessary documentation may execute affidavits regarding their status and cast their ballots without presenting a photo ID. Ind. Code 3-11.7-5-2.5(c); Pet. App. 25-26. State law allows such individuals to vote without presenting an ID in either of two ways. First, such voters may exercise the right of any Indiana voter to vote an "absentee" ballot in person at the office of the circuit court clerk or board of elections on any date between 29 days and one day before the election. See Ind. Code 3-11-4-1(a), 3-11-10-26(a), (c). Voters who choose to do so may file an absentee application, cast their ballot, and sign an affidavit of indigency or religious objection on a single trip to the local election office. See *id.* 3-11-4-3(2), 3-11.7-5-2.5(c); <www.in.gov/sos/photoid/exemptions.html>.

Second, any voter who appears at the polls without the requisite identification, either because an exemption applies or because the person does not have an ID in his or her possession at the time, may cast a provisional ballot. See Ind. Code 3-11-8-25.1(d). A provisional ballot will be counted so long as the voter appears before the circuit court clerk or the county election board no later than ten days following the election, and executes an affidavit that he or she is the same person who cast the provisional ballot, and either: (a) presents acceptable photo identification; or (b) executes an affidavit of indigency or religious objection. Ind. Code 3-11.7-5-1; 3-11.7-5-2.5(c). Pet. App. 25-26. If the county election board rejects the ballot, the individual may obtain judicial review in the local circuit court. Ind. Code 3-6-5-34.

3. Two different plaintiff groups—the Indiana Democratic Party and the Marion County Democratic Cen-

tral Committee; and two elected officials, along with several nonprofit organizations, including the Indianapolis Branch of the NAACP, the United Senior Action of Indiana, the Indianapolis Resource Center for Independent Living, and Concerned Clergy of Indianapolis—brought suit alleging that the Voter ID Law violates the First and Fourteenth Amendments to the Constitution because it imposes an unwarranted burden upon the right to vote. On April 14, 2006, the district court granted summary judgment in favor of the State, holding that the Voter ID Law is a permissible time, place, and manner restriction on voting. Pet. App. 16-149.

The district court stressed that petitioners had failed to "introduce[] evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Voter ID Law,] or who will have his or her right to vote unduly burdened by its requirements." Pet. App. 18. The court found that petitioner's expert report, which attempted to estimate the number of Indiana registered voters without a BMV-issued photo ID by comparing the voter registration rolls and BMV records in Marion County, was "utterly incredible and unreliable" and reflected "a conscious effort * * * to report the largest possible number" of impacted individuals. *Id.* at 60-62. To the extent that it shed any credible light on the matter, the court found that petitioners' report actually supported the State's position that its law had "no potential disparate impact * * * based on a voter's race or education level," and that "to the extent [the report] is accurate, [it] actually indicates that voters without photo identification are not significantly more likely to come from low income segments of society." *Id.* at 70, 72.

4. The court of appeals affirmed. Pet. App. 1-15. The court concluded that the Voter ID Law was not sub-

ject to strict scrutiny because the record at most revealed only a "slight" effect of eligible voters "disenfranchis[ing] themselves," and that negligible concern was outweighed by the State's interest in combating "voting fraud." *Id.* at 6-7. Furthermore, the court observed that the State was free to "take preventive action" to deter voter fraud and, with it, the dilution of legitimate votes. *Id.* at 8.

Judge Evans dissented. He would have subjected the Voter ID Law to "strict scrutiny" or at least "strict scrutiny light," Pet. App. 11, and concluded that the law failed that test, see *id.* at 11-15.

5. A petition for rehearing en banc was denied, with four judges dissenting. Pet. App. 151-155.

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioners have not carried the heavy burden of showing that the Voter ID Law is invalid on its face.

I. This Court requires a particularly demanding showing in facial challenges because such attacks run counter to numerous principles of judicial restraint: prudential standing, ripeness, and invalidating no more of a legislature's enactment than necessary. Petitioners' facial challenge to the Voter ID Law raises all of those concerns. Indeed, petitioners have failed to identify a single individual in Indiana who would vote if, but only if, the Voter ID law were invalidated. And, as the district court found, petitioners have utterly failed to show that the Voter ID law has had a discriminatory impact on any segment of society. Invalidating the Indiana law on its face would therefore require this Court to invert the analysis that it customarily applies to facial challenges, in which a law is constitutional unless there are

no circumstances in which it can be constitutionally applied.

II. In any event, the Voter ID Law clearly satisfies the inquiry established by this Court for reviewing the constitutionality of election laws. Because any election regulation necessarily imposes some burden on voters' exercise of the franchise, the Court has rejected the argument that "a law that imposes any burden upon the right to vote must be subject to strict scrutiny." *Burdick* v. *Takushi*, 504 U.S. 428, 432 (1992). Instead, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'" on voting, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* at 434 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983)).

Petitioners have failed to demonstrate that the Voter ID Law imposes a severe burden on the right to vote. Photo ID requirements are ubiquitous in American society today. For the 99% of voters in Indiana who already have a photo ID, the law requires no more than that the voter present the ID at the polls. For the less than 1% of Indiana voters who do not yet have an ID, the State offers them such an ID free of charge. And for those who are most likely to find it difficult to obtain even a free ID, state law provides alternative methods of voting that do not require presenting identification. Because petitioners have not shown that the Voter ID Law imposes a severe burden on the right to vote, it is subject to more generous review under the *Burdick* balancing analysis.

Any burden that is imposed by the Voter ID Law is more than justified by the State's interest in combating in-person voter fraud. Voter fraud itself constitutes an

impairment of the right to vote. In a close race, even a handful of fraudulent votes could invalidate the entire election, as has happened in Indiana. Moreover, the well-publicized fact of voter registration lists with fraudulent, deceased, or otherwise invalid names undermines the public confidence in the electoral process that is the lifeblood of democratic institutions. Particularly given that in-person voter fraud is difficult to detect without rigorous ID requirements and that as a practical matter it is important for the State to deter, not just detect and punish, voter fraud, the State has amply demonstrated its interest in passing its Voter ID Law.

III. HAVA does not preempt the Voter ID Law. HAVA explicitly states that its requirements do not prevent States from adopting administrative requirements that are "more strict" than HAVA's. 42 U.S.C. 15484. While Indiana's ID requirement is "more strict" than HAVA's, it is in no way "inconsistent with the Federal requirements." *Ibid.* A contrary interpretation would deprive the States of the flexibility that Congress intended to preserve under HAVA in enacting laws that would modernize and improve the electoral process as our democracy enters the 21st century.

ARGUMENT

Petitioners elected to bring a facial challenge to Indiana's Voter ID Law, and to bring such an action before the statute had ever been implemented in practice. Such a challenge is "the most difficult challenge to mount." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Petitioners' facial challenge is fatally undercut by the undisputed fact that they have failed to identify a single individual in Indiana whose ability to vote depends on that law. In light of that fact, petitioners' challenge flunks

any reasonable formulation of this Court's standard for evaluating facial constitutional challenges to legislative acts. Petitioners would avoid that conclusion by having this Court revamp the settled framework for evaluating First Amendment challenges to election laws and hold that a law that imposes any burden on the right to vote—indeed, as in this case, even a *hypothetical* one—subjects a law to strict scrutiny. This Court rejected precisely such a proposal in *Burdick*, 504 U.S. at 432, and petitioners provide no reason for the Court to reverse course here. Any individual is free to bring an as-applied challenge to Indiana's Voter ID Law grounded in their particular circumstances or actual experience and attempt to demonstrate that the law imposes an unconstitutional burden on his or her right to vote. But the court of appeals properly rejected petitioners' facial challenge to the Voter ID Law on the record here.

I. PETITIONERS HAVE FAILED TO SHOW THAT THE VOTER ID LAW IS INVALID ON ITS FACE

A. The only question presented for the Court's review is the constitutionality of the Voter ID Law *on its face*. See Dem. Br. i; Crawford Br. i. This Court long ago explained that "[a] facial challenge to a legislative Act is * * * the most difficult challenge to mount." *Salerno*, 481 U.S. at 745. "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Ibid.* Rather, in the typical case, to succeed in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Ibid.* See *Village of Hoffman Estates*

v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982).[3]

The rule disfavoring facial invalidation is animated by several related principles of judicial restraint. First, as a matter of prudential standing, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *United States* v. *Raines*, 362 U.S. 17, 21 (1960). Second, facial invalidation raises ripeness concerns because it invites "'premature interpretatio[n] of statutes' on the basis of factually barebones records." *Sabri* v. *United*

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[3] Although the Court has recognized that "[t]he First Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges," *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003), petitioners' invocation of the First Amendment as a source of their constitutional claims, Dem. Br. 1, 44; Crawford Br. 2, does not bring them within that exception. The overbreadth doctrine has been applied "only where its effect might be salutary," *Massachusetts* v. *Oakes*, 491 U.S. 576, 582 (1989) (plurality opinion), such as, for example, where threat of enforcement of a law that "punishes * * * protected free speech," "especially" one that "imposes criminal sanctions," may "deter or 'chill'" the speech, and individuals cannot be expected to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case adjudication." *Hicks*, 539 U.S. at 118-119. The Voter ID Law does not threaten to "punish" anyone, and there is no "risk" to an individual (or association with standing to represent that individual) who challenges the law as applied to their circumstances. Moreover, the ability to cast a provisional ballot means even someone unsure of the law need not suffer any loss of voting rights. In any event, to the extent the doctrine applies, petitioners inability to identify a single individual who is unable to vote as a result of the Voter ID Law fatally undercuts any suggestion of overbreadth here.

States, 541 U.S. 600, 609 (2004) (quoting *Raines*, 362 U.S. at 22). Third, facial invalidation conflicts with the Court's practice not to "nullify more of a legislature's work than is necessary." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 329 (2006). Relatedly, a facial challenge short-circuits the process by which potential constitutional questions are avoided when a statute is narrowed through the course of its application. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973).

B. Petitioners' facial challenge to the Voter ID Law highlights all of those concerns.

1. As respondents have explained, serious questions exist regarding petitioners' constitutional standing to bring this suit at all. See Resp. Br. 14-19. Petitioners' suit also implicates prudential standing concerns because of the significant divergence between the facts on which petitioners base their claims of standing and the types of injuries they highlight in their broad attack on the Voter ID Law. Cf. *Warth*, 422 U.S. at 499 ("the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on legal rights or interests of third parties"). For example, whereas the Democratic Party of Indiana asserts associational standing to represent individuals affiliated with the party, Dem. Br. 58-59, each of the individual voters the party identified as being burdened by the law and who consented to representation by the party is over 65 years of age and therefore has a right under Indiana law to vote absentee by mail, without producing a photo ID. See Pet. App. 80-81; p. 5, *supra*. Those voters, because they have that option, would seem to have a markedly weaker claim. Indeed, the party's argument with respect to the constitutional adequacy of *that* alternative voting method is confined to a footnote, see Dem. Br. 32

n.17, and the party instead focuses its argument on those who "simply cannot vote" or who "will not * * * successfully complete all the steps needed to vote." *Id.* at 23; see *id.* at 31-41. Yet, the party was unable to identify any such individual, much less one who it could represent through associational standing. See Pet. App. 80-81. Similarly, the individual plaintiffs themselves have failed to demonstrate that they have been directly injured by the Voter ID Law. See Resp. Br. 15-16.

2. Petitioners' inability to identify any concrete harms stemming from the Voter ID Law renders petitioners' arguments largely theoretical and speculative. Petitioners failed to identify any individual who would not vote as a result of the statute, Pet. App. 80-81, 94; *id.* at 5, and rely instead on their mere assertion that "there can be no doubt that these people exist." Dem. Br. 59; Crawford Br. 26, 27, 32, 37 ("the Indiana law will deter some people from voting" (quoting the court of appeals' opinion, Pet. App. 3)). But, as this Court has stressed, "[t]he delicate power of pronouncing an [act] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Raines*, 362 U.S. at 22. See *McDonald* v. *Board of Election Commr's*, 394 U.S. 802, 808 (1969) ("Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that [a statute] has in fact precluded [petitioners] from voting.").

The abstract quality of petitioners' challenge is exacerbated by their decision to attack the statute before it went into effect. Without any experience under the statute, petitioners premised their challenge on an expert's statistical analysis of registration rolls and BMV records. But the district court found that report to be "utterly incredible and unreliable." Pet. App. 60. And,

in any event, the report revealed "no potential disparate impact * * * based on a voter's race or education level and only a small potential disparate impact based on income level." *Id.* at 70. Having failed to provide proof of a burden on voting in the district court, petitioners now ask this Court to decide the constitutionality of the Voter ID Law on the basis of reports that post-date the district court ruling and have never been subjected to cross-examination or peer review. See, *e.g.*, Dem. Br. xiv-xvi (citing no fewer than 11 publications that post-date the district court decision); *id.* at 34-35 (citing October 2007 "working paper" as "evidence" that Indiana's law "placed significant burdens on voters" (quotation marks omitted)); *id.* at 12 (citing November 2006 report as evidence regarding incidence of lack of identification); Crawford Br. 15, 40 n.19, 41 n.20 (same). As we discuss below, see p. 22, *infra*, an even more recent unpublished study that focuses exclusively on Indiana's experience points in the opposite direction. But, more fundamentally, such speculation and as-yet untested evidence cannot satisfy the standard for proving a statute facially unconstitutional.

The premature nature of petitioners' challenge has also caused them and their amici to posit constructions of the Voter ID Law that are contrary to the State's own interpretation and application of the statute. For example, the Democratic Party repeatedly asserts (Dem. Br. 11, 16) that indigent persons without identification and those with religious objections may not execute affidavits to that effect before the election, at the same time the individual casts an in-person absentee ballot. See also Lawyers' Comm. Br. 27 (same). But the State's published guidance is to the contrary. See <www.in.gov /sos/photoid/exemptions.html>. Likewise, the League

of Women Voters suggests (Br. 24-29) that recently married individuals, or others whose IDs vary slightly from the names on the rolls, will be rejected because the names do not "conform," but the Indiana Election Division's Guidance says otherwise. *Photo ID Interpretations* 2.

3. The remedy petitioners seek—facial invalidation of the Voter ID Law—also bears no relation to the constitutional harms petitioners assert. If, as petitioners contend, it is unconstitutional to require a homeless person to vote absentee in person (or at the polls with subsequent validation by affidavit) because he is unable to obtain a BMV-issued ID (see, *e.g.*, Crawford Br. 18 (citing case of Kristjan Kogerma, J.A. 67)), then a narrower remedy would be to enjoin the BMV from denying an ID on the ground that a person has no address, or to enjoin the IDOH from collecting a search fee for a birth certificate in that circumstance. Such challenges should await actual circumstances in which those difficulties may or may not arise. But at a minimum, as the Court reiterated in *Ayotte*, courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force." 546 U.S. at 329.

C. Petitioners not only have not identified a single individual who would be unable to vote because of the Voter ID Law, but they make no serious argument that the Voter ID Law imposes an unconstitutional burden on the more than 99% of Indiana voters who already possess an ID that satisfies the statutory requirements. Accordingly, instead of attempting to carry the "heavy burden," *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991), to "establish that no set of circumstances exists under which the Act would be valid," *Salerno*, 481 U.S. at 745, petitioners effectively ask this Court to invert the set-

tled inquiry and hold that the Voter ID Law must be struck down *in toto* "[e]ven if only a *single* citizen is deprived completely of her right to vote." Dem. Br. 33 (emphasis added; brackets in original) (quoting dissent from denial of rehearing, Pet. App. 154); see Crawford Br. 37 (focusing on the "burdens on individual voters"); *id.* at 38 ("[t]hat Indiana's photo identification law may affect few voters is irrelevant"). That argument not only has no footing in this Court's case law, but could have an extraordinary impact on election laws.

For example, although the Democratic Party suggests that HAVA's ID requirement (see p. 3, *supra*) is a valid example of an acceptable "less-restrictive voter-identification rule[]," Dem. Br. 37-39, 51, petitioners' theory of the case—that an election law is invalid if one can hypothesize any single individual who would be prevented from voting by the burden it creates—would cast serious doubt on the constitutionality of HAVA as well. HAVA's ID requirements pose no serious obstacle to the 99% of the population with photo IDs or alternative means of proving their residence and identification. But one can just as easily hypothesize a theoretical individual who would be prevented from registering to vote by HAVA because he lacks the documentation it requires. Compare 42 U.S.C. 15483(b)(2)(A)(i)(II) (accepting non-photo ID that "shows the name and address of the voter"), with J.A. 67 (affidavit of individual denied BMV-issued ID because he "did not have anything on it with proof of my address"). But that is not the test. Rather, to make out a facial challenge, it is petitioners' burden to "establish that no set of circumstances exists under which the Act would be valid," *Salerno*, 481 U.S. at 745.

Because petitioners have not come close to meeting the high threshold set for facial invalidation of a legisla-

tive act, petitioners' facial challenge to the Voter ID Law must be rejected. As with any statute, the Voter ID Law remains "open to a proper as-applied challenge in a discrete case," *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007), but this facial challenge lacks merit.

II. THE VOTER ID LAW IS A REASONABLE ADMINISTRATIVE RULE THAT FURTHERS THE STATE'S COMPELLING INTEREST IN COMBATING VOTER FRAUD

A. States Have Broad Authority To Establish Rules To Ensure The Integrity Of Elections

The Constitution expressly provides that state legislatures are to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. Art. I, § 4, Cl. 1. And this Court has long recognized that States "have broad powers to determine the conditions under which the right of suffrage may be exercised," *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965) (quoting *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959)); *Mason* v. *Missouri*, 179 U.S. 328, 335 (1900), and a "compelling interest in preserving the integrity of [the] election process," *Purcell* v. *Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam) (citation omitted). This authority reflects the fact that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government," and that "[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Ibid.* (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)).

Because States must necessarily "play an active role in structuring elections" to ensure that they are "fair and honest * * * rather than chaos," and because

"[e]lection laws will invariably impose some burden upon individual voters," this Court has stressed that a citizen's "right to vote in any manner" is not "absolute." *Burdick*, 504 U.S. at 433. Likewise, the Court has held that not every voting regulation that "imposes [a] burden upon [individual voters] must be subject to strict scrutiny." *Id.* at 432. See *Clements* v. *Fashing*, 457 U.S. 957 965-966 (1982) (plurality opinion); *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972). Rather, "a more flexible standard applies." *Burdick*, 504 U.S. at 434. Under that approach, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'" on an individual's right to vote, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Ibid.* (quoting *Anderson*, 460 U.S. at 788). In contrast, when the right to vote is "subjected to 'severe' restrictions," "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Ibid.* (quoting *Norman* v. *Reed*, 502 U.S. 279, 289 (1992)).

Petitioners point to the fact that *Burdick* mentions the "extent to which [the States'] interests make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789), and mistakenly characterize that and similar statements as establishing a "less restrictive[]" alternative standard for analyzing electoral regulations. Dem. Br. 26; *id.* at 27 (emphasizing "*necessary*"); *id.* at 41 (same). But this Court rejected that interpretation of the standard in *Burdick* itself, in which it characterized the dissenting opinion's test as a form of "strict scrutiny" analysis precisely because it faulted the State for failing to pursue "less drastic means." 504 U.S. at 440 n.10. In short, because election laws "invariably impose *some* burden

upon individual voters," heightened scrutiny is reserved only for those laws that impose "'severe' restrictions" on the right to vote. *Id.* at 433-434 (emphasis added).

B. Because The Voter ID Law Is Neither Discriminatory Nor A Severe Burden On The Franchise, Heightened Scrutiny Is Unwarranted

Petitioners and their amici argue that the Indiana Voter ID Law imposes any number of severe burdens on the right to vote. But as the district court found, the fact is that, "[d]espite apocalyptic assertions of wholesale voter disenfranchisement, [petitioners] have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting" by the Indiana law. Pet. App. 101.

1. The Voter ID Law does not discriminate with respect to the right to vote

a. Petitioners contend that the Voter ID Law should be subjected to heightened scrutiny because it has a "discriminatory impact" on "persons in lower socioeconomic brackets." Dem. Br. 35-36. That argument fails on at least two counts. First, the Court has refused to recognize poverty, without more, as a suspect classification that warrants heightened scrutiny. *Harris* v. *McRae*, 448 U.S. 297, 323 (1980). And the same is true of the other groups that are alleged to suffer disparate impact of the Voter ID Law: the elderly and disabled. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) (age); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441-442 (1985) (mental retardation). Second, even with respect to a protected class, disparate impact alone does not trigger heightened scrutiny under the Fourteenth Amendment. *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 271-272 (1979); *Village of Arlington Heights* v.

Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 237-239 (1976). Rather, "[s]trict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government." *Wisconsin* v. *City of New York*, 517 U.S. 1, 18 n.8 (1996). Petitioners offer no evidence that the Indiana legislature harbored such an improper purpose.

Petitioners contend that, notwithstanding the general rule that a plaintiff must show discriminatory intent, "[u]nder the *Burdick* standard, election laws that exhibit * * * discriminatory effects" are subject to heightened scrutiny, and "must be justified as necessary to serve very substantial state interests." Dem. Br. 36. But this Court has applied the general equal protection rule to voting cases as well. As the Court recognized in *Reno* v. *Bossier Parish School Board*, 520 U.S. 471 (1996), "[s]ince 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose," *id.* at 481 (citing *City of Mobile* v. *Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion)).

b. In any event, petitioners have failed to demonstrate a discriminatory impact as well. The district court found that petitioners' own expert's report regarding the effect of the Voter ID Law—which it found "utterly incredible and unreliable," Pet. App. 60—nevertheless "revealed no potential disparate impact * * * based on a voter's race or education level and only a small potential disparate impact based on income level." *Id.* at 70; see *id.* at 72; J.A. 279 (expert's deposition testimony: "we could not conclude one way or the other in terms of the distinction in terms of racial categories").

That failure of proof should be the end of the matter for purposes of determining what level of review applies.

In an attempt to fill that evidentiary void, petitioners rely in this Court on studies and reports produced since the trial court litigation that have yet to be subjected to cross-examination or peer review. See Dem. Br. 12 & n.8 (citing Nov. 2006 survey); Crawford Br. 15, 40 n.19, 41 n.20 (same). There is no basis to consider such extra-record materials, but the most recent studies nevertheless *undermine* petitioner's assertion of disparate impact. The Cal. Tech./M.I.T. study petitioners cite as evidence of the statute's burden (Dem. Br. 34), actually states that "there does not seem to be a discriminatory impact of the requirements for some subgroups, such as nonwhite registered voters." R. Michael Alvarez et al., *CalTech/MIT Voting Technology Project, Working Paper #57, Version 2*, at 21 (Oct. 2007) <http://www.vote.caltech.edu/media/documents/wps/vtp_wp57.pdf>. Likewise, the one report that has been conducted looking exclusively at voting in Indiana before and after the Voter ID Law found "no consistent evidence that counties that have higher percentages of minority, poor, elderly, or less-educated population suffer any reduction in voter turnout relative to other counties." Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis, Report 10-2007* 1 (Nov. 2007) (Milyo Report) <http://www.truman.missouri.edu/uploads/publications/report%2010-2007.pdf.>

Thus, even if impact alone were sufficient to warrant applying heightened scrutiny to the Voter ID Law, there is no evidence to support a finding of such impact.

2. The Voter ID Law does not impose a severe burden on the right to vote

a. Petitioners have also failed to show that the Voter ID Law imposes a severe burden on the right to vote. It is commonplace in virtually every polling place in America that voters are asked to identify themselves before they may cast a vote. Petitioners cannot seriously take issue with a requirement that someone arriving at the polls produce some indication of identity and residence. Indiana's choice of a means to enforce such an identification requirement does not cross any constitutional line, especially in light of the commonsense reality that a photo ID requirement is familiar in numerous other facets of everyday life, and is a particularly effective means of verifying a voter's identity.

The record establishes that "the vast majority of Indiana's voting age population"—"an estimated 99%"—"possesses the requisite photo identification." Pet. App. 68-69. And being asked to present a photo ID as a means of verifying identity cannot be regarded as a severe burden in any legal or practical sense. Indeed, as the district court noted, "presentation of photo identification is routinely required for a multitude of everyday activities—from boarding a plane, entering a federal building, to cashing a check." *Id.* at 108. See *Foti* v. *McHugh*, No. 05-16079, 2007 WL 2472340 (9th Cir. Aug. 28, 2007) (rejecting constitutional challenge to federal courthouse's requirement that visitors show photo ID); *Gilmore* v. *Gonzales*, 435 F.3d 1125 (9th Cir. 2006) (rejecting constitutional challenge to requirement to show ID to board an airplane), cert. denied, 127 S. Ct. 929 (2007). Federal law likewise requires any employee to show identification at the time of hire for purposes of Form I-9. See 8 C.F.R. 1274a.2(b)(1)(i), (v). The Consti-

tution does not require that we afford less security to the important civic task of voting, especially in light of the obvious state interest in ensuring electoral integrity. See Pet. App. 3; *id.* at 109.

b. Nor does the Voter ID law impose a severe burden on the 1% of the voting age population in Indiana that—it is assumed—does not already have a photo ID. To begin with, as discussed, the fact that 1% of the State presumably faces an additional hurdle to voting as a result of the Voter ID Law itself provides no basis for invaliding the Indiana statute on its face. See pp. 13-18, *supra*. But even putting that to one side, petitioners have failed to demonstrate that the Voter ID Law imposes an impermissible burden on the at most 1% of the Indiana voters who do not already possess a photo ID.

At the outset, there is no evidence of what portion of the 1% without a BMV-issued ID may have a federal government ID or already possess the documents necessary to obtain a BMV photo ID, which Indiana provides for free. See Pet. App. 106 n.75. Accordingly, it is "*factually impossible* * * * at this juncture" to conclude that the Voter ID Law's requirements impose an impermissible burden on anyone's right to vote. *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 (2005) (internal quotation marks and citation omitted). As the court of appeals noted, petitioners did not identify "a single plaintiff * * * who would vote were it not for the law." Pet. App. 5; *id.* at 101. Plaintiffs challenging other voter ID laws have likewise failed to identify such an individual. See *Gonzalez* v. *Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (Arizona law); *Common Cause/Ga.* v. *Billups*, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007) (Georgia law).

Petitioners also complain (Dem. Br. 31-32; Crawford Br. 41-42) about the time, cost, and inconvenience that

may be required of these voters to obtain a free photo ID from BMV. Such inconveniences, however, do not trigger heightened scrutiny. "Election laws will invariably impose some burden upon individual voters" and strict scrutiny is not triggered merely because a law makes casting a ballot marginally more difficult for some voters. *Burdick*, 504 U.S. at 433; *Kramer* v. *Union Free Sch. Dist.*, 395 U.S. 621, 626 n.6 (1969). Indeed, it is hard to imagine any election regulation that does not limit the opportunity of, or cause some inconvenience to, at least some citizens who choose to vote. A State's choice of poll locations and hours of operation will inconvenience some voters and could require them to find child care, incur transportation costs, or even miss work in order to vote in-person. Some citizens may also need to stand in long lines to vote in-person depending on where and when they go to the polls. And any identification requirement—photo or otherwise—will inconvenience some voters. Such routine costs and inconveniences, however, do not render a State's electoral process constitutionally defective.

Petitioners maintain (Pet. App. 45) that a disproportionate number of the 1% of prospective voters without a BMV-issued photo ID are elderly, disabled and poor voters. But to the extent such voters are disproportionately elderly and disabled that fact hurts petitioners' claim because such voters automatically qualify to vote absentee, see Ind. Code 3-11-10-24(a)(4), (5); and accordingly can cast a ballot by mail without obtaining any photo ID. See Pet. App. 81-82. Indiana law also allows an indigent person to vote in multiple ways, even without obtaining an ID. See p. 6, *supra*. Accordingly, because the right to vote does not include the right to vote in-person, or by any particular method, the Voter ID

Law does not impose *any* burden on the right to vote for a majority of the 1% of Indiana voters who do not have a photo ID, but may nonetheless vote absentee or by provisional ballot. Cf. *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 9 (1982) (the Constitution does not "compel[] a fixed method of choosing state or local officers or representatives").

In order to bolster their claim of burden, petitioners again rely on unreviewed studies that were not subjected to the district court's scrutiny to demonstrate a purported burden. See Dem. Br. 12; Crawford Br. 15. But as discussed, those studies—which were not considered below and are not part of the record—provide no basis for invalidating the Indiana law. In addition, the one study focused on the Indiana Voter ID Law found "no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties." Milyo Report abstract.[4]

c. Petitioners also contend (Dem. Br. 27; Crawford Br. 51-52) that the Voter ID Law imposes *per se* a severe burden because it is analogous to a poll tax. That contention is mistaken. As this Court has held, the prototypical poll tax is a "capricious or irrelevant factor" that is "not germane" to one's qualification to vote. *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). The Voter ID Law is the opposite. It is designed to ensure that the enforcement of concededly legitimate restrictions on the franchise—*viz.*, limiting eligible votes to registered voters in the relevant district—in a manner that directly promotes the integrity of the electoral

[4] In his study of the effects of the Voter ID Law, Professor Milyo discusses what he views as flaws in the methodology of certain studies on which petitioners and their amici rely. See Milyo Report 2-4.

process. The law does not impose a tax on any citizen, much less condition voting on payment of a fee.

Moreover, the State will issue a photo ID *free of charge* to every registered voter who will be over the age of 18 at the next election and does not have an Indiana driver's license. Nor is any indigent voter who does not possess a photo ID excluded from voting because he or she is unable to pay for the documentation that would be necessary to obtain one. Those voters can vote an in-person absentee ballot at the courthouse before election day and sign an affidavit of indigency or vote at the polls and go to the courthouse thereafter. See p. 6, *supra*. In short, the Indiana Voter ID imposes no more of a "tax" on the right to vote than the fact that to get to the polls a voter may need to pay for bus fare, parking, or a baby sitter. In other words, it is not a poll tax at all.

d. The conclusion that the Indiana Voter ID Law does not impose a severe burden on the right to vote follows *a fortiori* from *Burdick*. In that case, the Court held that a Hawaii law that banned write-in voting "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote." 504 U.S. at 439. Justice Kennedy, joined by Justices Blackmun and Stevens, disagreed. In their view, the Hawaii law imposed a "significant burden" on the right to vote because, as a result of the ban on write-in voting, a plaintiff had "*no way* to cast a meaningful vote" for a candidate who was not on the ballot. *Id.* at 442 (emphasis added). Under the Indiana law at issue in this case, Indiana voters are not barred from voting for any candidate. They simply must present a photo ID at the polls, and if they do not have or cannot afford such an ID, the State has provided a number of reasonable options to ensure that they can obtain one or submit a

provisional ballot that can be counted upon subsequent proof of identification. See pp. 5-6, *supra*.[5]

C. The Voter ID Law Serves The State's Compelling Interest In Preserving The Integrity Of The Electoral Process

The State's interest in preventing actual or threatened voter fraud is more than sufficient to justify any burden that is imposed by Indiana's Voter ID Law. As this Court has recognized, "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 127 S. Ct. at 7 (quoting *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). Indeed, as the court of appeals explained, "voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote." Pet. App. 6 (citing, *e.g.*, *Purcell*, 127 S. Ct. at 7; *Sims*, 377 U.S. at 555). As the district court found, the Indiana Voter ID Law advances the State's interest in preventing voter fraud in a way that strikes a "reasonable" balance "between discouraging fraud * * * and encouraging turnout." Pet. App. 106-107.

While recognizing a powerful state interest in deterring election fraud, see Dem. Br. 42; Crawford Br. 46,

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[5] The *Burdick* dissenters noted that Hawaii's prohibition on write-in voting was at odds with the trend in "new democracies in foreign countries." 504 U.S. at 444. Here, it is just the opposite. Photo ID requirements are prevalent in other countries' elections. As the Commission on Federal Election Reform, chaired by President Carter and former Secretary of State Baker, noted in support of its recommendation that the United States adopt a photo identification requirement, "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." *Building Confidence in U.S. Elections* 5, 25 (2005) <http://www.american.edu/ia/cfer/report/full_report.pdf>.

petitioners contend that Indiana lacks an interest in deterring the particular type of fraud to which the Voter ID Law is addressed—in-person voter impersonation—because of the lack of reported incidences of such fraud in Indiana. See Dem. Br. 43; Crawford Br. 47. Further, petitioners argue that, to the extent the State has a legitimate interest in combating such fraud, the Voter ID Law is not "necessary" to serve that interest because less restrictive tools are available. Dem. Br. 41; Crawford Br. 55-56. Both arguments are mistaken.

There is no requirement that the State show evidence of past in-person voter impersonation for the State's interest in preventing such fraud to qualify as important. A State need not wait to suffer a harm; it can adopt prophylactic measures to prevent it from occurring in the first place. That is particularly true in a situation, like voter fraud, where the temptation is obvious and the consequences of undeterred and undetected violations are enormous. Thus, legislatures may "respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195-196 (1986). This Court has declined to "second-guess" legislative determinations on the "need for prophylactic measures where corruption is the evil feared." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982).

The State's interest in deterring voter fraud before it happens is evident from the monumental harm that can come from such fraud. The East Chicago mayoral primary in Indiana proves the point. Although the plaintiff was only able to show 155 invalid absentee votes, the court found that the "[w]idespread corrup-

tion" had left the putative winner's 278-vote victory "inherently deceptive and unreliable," and the court invalidated the entire election. *Pabey*, 816 N.E.2d at 1151, 1154. Thus, the fraudulent votes of even a small number can, in a close election, invalidate the votes of every other citizen who participated in the election. Even when the election is not so close, "[e]very false registration and every fraudulent ballot cast harms the system by cancelling votes cast by legitimate voters." 148 Cong. Rec. 20,833 (2002) (HAVA conference report) (statement of Sen. Bond). "If your vote is canceled by the vote of a dog or a dead person, it is as if you did not have a right to vote." *Id.* at 20,832 (same). Moreover, whatever its exact incidence, even the prospect of voter fraud may undermine the integrity of the voting process. In light of the obvious temptation to engage in such fraud and the enormous costs if the integrity of the process is undermined, States have an obvious incentive to deter such violations before they happen.

In any event, as the Carter-Baker Commission found, there is "no doubt" that in-person voter fraud occurs. J.A. 138. Moreover, the record includes reported incidents of in-person voting fraud in nine States, Pet. App. 109, and there is no reason to believe that Indiana is immune from such fraud. If anything, as the district court noted, *ibid.*, there is a greater "opportunity for in-person voter fraud to occur" in Indiana since the State's voter rolls are "significantly inflated." That evidence, combined with the fact that impersonation fraud is extremely difficult to detect in the absence of some reliable means of checking the voter's identity (like a photo ID), provides more than ample support for the State's legislative judgment that a photo ID requirement was warranted to combat voter fraud in Indiana.

Petitioners contend that signature matching is an adequate alternative to verify voters' identities at the polls and point to the fact that a photo is not required for absentee ballots. Dem. Br. 51-52; Crawford Br. 55-56. But a photo ID requirement is less easily administered in the case of absentee ballots as opposed to in-person voting and a State may deal with the added risk of fraud in the absentee context by limiting it, as Indiana has, to special contexts.

Petitioners' amici suggest other alternatives, including affidavits, utility bills, social security numbers, or dates of birth (see AALDEF Br. 9-11; Lawyers' Comm. Br. 29-31; NLCHP Br. 25-28; Secretaries of State Br. 24; Brennan Ctr. Br. 33), but none of those methods is as reliable as a photo ID. In addition, under petitioners' analysis, those methods would themselves be subject to constitutional challenge. Indeed, a utility bill requirement might be more burdensome than a photo ID requirement for, say, a homeless person. A State might reasonably rely on one (or more) of those methods, but the Constitution does not require Indiana to use the least restrictive alternative in establishing the time, place, and manner of its elections.

III. HAVA'S IDENTIFICATION REQUIREMENTS DO NOT PREEMPT INDIANA'S VOTER ID LAW

Petitioners' amici (Sen. Feinstein Br. 2-3, 19) argue that HAVA's identification requirements preempt Indiana's stricter requirements. That argument—which was neither raised nor decided below—is without merit. By its terms, HAVA establishes mandatory "minimum" voter identification requirements and explicitly provides that "nothing in [it] shall be construed to prevent a State from establishing * * * requirements that are more

strict." 42 U.S.C. 15484. See 148 Cong. Rec. at 20,834 ("this bill in no way limits the ability of the states from taking steps beyond those required") (statement of Sen. Bond); U.S. Election Assistance Commission, *EAC Advisory 2005-006: Provisional Voting and Identification Requirements* 1 (2005).

While Indiana's requirements are "more strict" than those of HAVA, they are not "inconsistent with the Federal requirements." 42 U.S.C. 15484. HAVA's identification requirements, which apply only to first-time voters who registered by mail and whose identities were not established from information submitted at that time, 42 U.S.C. 15483(b)(3)(A), (B), relate to authentication of a voter's *registration*, whereas the Voter ID Law confirms the identity of those casting ballots. Amici's argument would convert HAVA into both a floor *and a ceiling*, thereby divesting States of the flexibility that Congress intended them to retain. See 42 U.S.C. 15485.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

38

No. 07-21

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE AARP AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF PETITIONER [SEVERE BURDEN ON OLDER VOTERS]

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IN THE

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v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICI CURIAE OF AARP IN SUPPORT OF PETITIONER [SEVERE BURDEN ON OLDER VOTERS]

STATEMENT OF INTEREST OF AMICI CURIAE

AARP is a nonprofit, nonpartisan organization dedicated to addressing the needs and interests of Americans aged 50 and older.[1] AARP is the largest

[1] Pursuant to this Court's Rule 37.6, *amici* note that no counsel for any party authored this brief in whole or in

membership organization representing the interests of older Americans, with more than thirty-nine million members—over 880,000 of whom live in Indiana. Older individuals vote in disproportionately high numbers, and AARP has long advocated for fair and simple procedures that facilitate this high level of participation. AARP supports fair and effective procedures to detect and prevent voter fraud. AARP does not support procedures that reflect partisan bias, or that permit arbitrary or discriminatory reviews or voter challenges that may discourage turnout by older voters.[2]

Based on these principles, AARP Foundation Litigation has served as co-counsel in cases in Georgia and Arizona challenging state photo identification voting requirements,[3] and AARP has also participated as *amicus curiae* in challenges to similar legislation in Missouri and Michigan.[4] These

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part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have filed consent letters with the Clerk regarding *amicus* briefs.

[2] Unless otherwise specified, "older voters" herein refers to all individuals over the age of 50 who are eligible to vote.

[3] *See Common Cause/Georgia* v. *Billups*, 501 F. Supp. 2d 1333 (N.D. Ga. 2007); *Gonzalez* v. *Arizona*, Nos. 06-1268-PHX, CV 06-1362-PHX, CV 06-1575-PHX, 2006 WL 3627297, slip op. (D. Ariz 2006).

[4] Brief of *Amicus Curiae* – Women's Voices Raised for Social Justice, AARP, *et al.*, 203 S.W. 3d 201 (Mo. 2006)

laws threaten to reduce legitimate citizen participation—particularly participation by older voters—in the electoral process.

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and wellbeing of low-income older persons in their country. For thirty-five years, NSCLC has served that population through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. NSCLC has participated in numerous cases advocating on behalf of the rights of older persons. NSCLC recognizes the serious adverse impact of burdensome election rules on many older voters, especially older voters with limited incomes and/or disabilities, as well as older voters who are members of minority groups that historically have encountered difficulty preserving their voting rights.

SUMMARY OF ARGUMENT

Indiana's photo identification law[5] ("Indiana photo ID law" or "Indiana photo ID requirement") places a

(No. SC88039); Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law and AARP, *In re Request for Advisory Opinion Regarding Constitutionality of 2005 P.A. 71*, 721 N.W.2d 799 (Mich. 2006) (No. 130589).

[5] *See* Senate Enrolled Act No. 483 (2003), Pub. Law. No. 103-2005, codified at Ind.Code §§ 3-5-2-40.5; 3-10-1-7.2; 3-10-8-25; sections of Ind.Code ch. 3-11-8; sections of 3-11.7; and 9-24-16-10.

severe burden on older Americans' fundamental right to vote, and thus violates the First and Fourteenth Amendments of the United States Constitution unless it survives strict scrutiny. Because the court of appeals failed to evaluate properly this appreciable burden as required under *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992), the decision below should be reversed.

Voters who possess a driver's license, or other form of government-issued photo identification, suffer little or no inconvenience under the Indiana photo ID law. However, older voters, including older voters living in Indiana, are significantly less likely to have photo identification compared to members of other age groups. Contrary to what proponents of the Indiana Photo ID requirement suggest, absentee voting is not an adequate substitute for in-person voting, and as such any older voter who wishes to fully exercise the right to vote must first obtain the requisite identification. To obtain photo identification, older voters must overcome numerous financial and nonfinancial obstacles. The burdens created by these obstacles are severe, and are even more severe for Indiana's older voters who are also minorities, women, and/or individuals with disabilities.

The severe burdens resulting from the Indiana photo ID requirement will hinder the right of innumerable older Indiana voters to participate fully in the democratic process. The decision below should be reversed. The Indiana Photo ID requirement

should be subject to strict scrutiny, and the decision below should be reversed.

ARGUMENT

In upholding the Indiana photo ID requirement, the Seventh Circuit assumed that the law need only survive minimal scrutiny. *See Crawford* v. *Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (Pet. App. 5–6.) Under *Burdick*, however, a court assessing a constitutional challenge to a state election law under the First and Fourteenth Amendments must determine the proper "rigorousness of . . . inquiry" – or level of scrutiny – based on the "extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *See* 504 U.S. at 434. A requirement that places "severe restrictions" on the right to vote must survive the most exacting scrutiny, and thus is unconstitutional unless the government shows that the restriction is narrowly drawn to meet a compelling state interest. *Id.* (quotation and citation omitted). Using strict scrutiny, the court must then weigh "'the character and magnitude'" of the burden on the plaintiffs' constitutional right to vote, against "'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* at 434 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983)).

In 2005 the Indiana legislature amended the Indiana Code to include a requirement that registered voters provide proof of identification in

order to vote at the polls. *See* Senate Enrolled Act 483 (2003), Pub. L. No. 103-2005. "Proof of identification" includes only unexpired Indiana or federal government-issued photo identification. *Id.* § 3-5-2-40.5. The identification must include the name of the individual, and the name on the identification must conform exactly to the name in the individual's voter registration record. *Id.* The most common forms of acceptable identification are Indiana drivers' licenses or identification cards, *see* (Pet. App. 31), although a U.S. Passport would also be adequate under the law. To obtain any acceptable form of identification, the individual will at some point be required to present a certified copy of his or her birth certificate.[6]

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[6] Indiana regulations require driver's-license and identification-card applicants without a current Indiana driver's license, permit, or identification card to present at least one primary document to the Bureau of Motor Vehicles. 140 Ind. Admin. Code § 7-4-2 (2006). The primary document applicable to most citizens is a certified birth certificate. *Id.* Other documents are only available to some classes of American citizens, such as those born abroad (certificate of naturalization/citizenship, certification of report of birth, U.S. consular report of birth, birth certificates issued by U.S. territories) and those who have ties to the military (U.S. military or merchant marine identification card with photo, U.S. veterans' universal access identification card with photo). An applicant for an Indiana driver's license or identification card may show an Indiana driver's license or learner's permit, or a U.S. Passport, but to have obtained these documents, a certified birth certificate must have been presented initially. *See id.*; U.S. Department of State, *Application for a U.S. Passport, Instruction Sheet*, page 2 of 4, *available at* http://www.state.gov/documents/organization/79955.pdf [hereinafter *Passport Application*].

The Indiana photo ID requirement disproportionately affects older voters because they are less likely to have the identification and other documents necessary for compliance. In addition, the burden on many of these older voters to obtain the required identification is severe, thus warranting strict scrutiny review.

I. INDIANA'S PHOTO IDENTIFICATION LAW DISPROPORTIONATELY AFFECTS OLDER VOTERS, AN EFFECT THAT IS NOT MITIGATED BY THE ABSENTEE VOTING EXCEPTION.

Older Americans consistently demonstrate a strong commitment to the electoral process by exercising their right to vote more frequently than other age groups. In the 2004 presidential election, citizens 55 and older reported voting at a rate of 71.8%, as compared with a rate of 63.8% among all Americans. U.S. Census Bureau, *Voting and Registration in the Election of November 2004: Population Characteristics* 4 (Mar. 2006), *available at* http://www.census.gov/prod/2006pubs/p20-556.pdf.

As the number of older Americans rises, and the life expectancy of the U.S. population increases, the influence of older voters on the electoral process has

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Indiana also requires driver's-license applicants to provide a Social Security number document, which includes a Social Security card or a letter or Numident report from the Social Security Administration. 140 Ind. Admin. Code § 7-4-2.

the potential to increase as well. This segment of the population is expected to grow rapidly during the coming years, as children born during the "baby boom" reach age 65 and beyond. *See* Administration on Aging, U.S. Department of Health and Human Services, *A Profile of Older Americans: 2006* (Last Updated July 12, 2007), http://www.aoa.gov/prof/Statistics/profile/2006/profiles2006.asp. By 2030, there will be 71.5 million potential older voters in the United States — nearly twice the number from 2005. *Id.* As a result, older voters likely will comprise a larger percentage of the electorate and play an increasingly important role in American electoral politics.

The Indiana Photo ID requirement disproportionately affects older voters because they are substantially less likely to have the required identification. Moreover, because absentee voting is not an adequate substitute for the right to participate in the political process in person, all older Indiana voters who wish to fully participate in the electoral process must obtain photo identification.

A. Indiana Has Placed an Unnecessary and Severe Burden on Older Voters' Fundamental Right To Vote.

Older voters are substantially less likely than other voters to have the identification required by the Indiana photo ID law, for a variety of reasons. When older voters apply for a new or renewal license, they face heightened scrutiny from state bureaus or departments of motor vehicles ("BMV"s or "DMV"s).

These voters are also often enccuraged by family members (both subtly and less so), to relinquish their driver's licenses.

Although older drivers have fewer accidents than other age groups, a few high-profile accidents have led states to raise the standards for older drivers to obtain a driver's license. *See* Kelley Schoonover, *Senior Drivers' Numbers Swelling: States Face Decisions About How to Deal with Older Motorists as Boomers Age*, Orlando Sentinel, Oct. 28, 2006. Although Illinois and New Hampshire are the only states to require drivers over a specific age to pass a road test, a number of states provide for special requirements for older Americans to obtain a driver's license. *See* Insurance Institute for Highway Safety, *U.S. Driver Licensing Procedures for Older Drivers* (July 2007), http://www.iihs.org/laws/olderdrivers.aspx [hereinafter *Licensing Procedures*].

Seventeen states, including Indiana, provide that drivers over a certain age must renew their licenses more frequently than other drivers. *See id.*; Ind. Code § 9-24-12-1; 9-24-12-10. At least ten states require a special vision screening for older drivers, and some require presentation of a physician's note attesting to the individual's fitness for driving. *See Licensing Procedures, supra*. Seventeen states also require drivers over a certain age to appear in person at the DMV to renew their licenses. *Id.* Older drivers may be denied a license for inability to meet the unique thresholds dictated by these standards. Moreover, countless older drivers "self-regulate," giving up their driving privileges voluntarily rather

than subject themselves to the added scrutiny. *See* Ari Houser, AARP Public Policy Institute, *Fact Sheet: Older Drivers and Automobile Safety* 2 (Aug. 2005), *available at* http://assets.aarp.org/rgcenter/il/fs51r_drivers.pdf.

As a result, it is no surprise that, as the district court noted, *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 824 n73 (S.D. Ind. 2006) (Pet. App. 104 n73,) a "verifiable poll" indicates that a significant number of persons who identified themselves as registered Indiana voters aged 60 or older have neither a valid driver's license nor a state-issued identification card. Susan L Silberman, Indiana AARP, *Voter Identification in Indiana: A Demographic Analysis of Impact on Older Indiana Citizens* (October 2005) (J.A. at 30.) [hereinafter *Indiana AARP Voter Identification Survey*]. The Census Bureau estimates that, in 2006, Indiana's population included 780,992 residents over the age of 60. U.S. Census Bureau, *Fact Sheet: Indiana*, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US18&_state=04000US18. The Indiana AARP survey found that three percent of respondents had neither a valid driver's license nor a state-issued identification card, which can be extrapolated to estimate that more than twenty-three thousand potential Indiana voters over the age of 60 lack the requisite identification to vote under the Indiana photo ID requirement. Silberman, *Voter Identification in Indiana*, *supra*, at 32. The findings were even more pronounced for individuals who are 75 or older, with six percent of those registered

Indiana voters reporting that they were without the identification needed to vote. *Id.* at 32.

National surveys suggest that even larger numbers of America's older voters would be unable to vote if their respective states adopted a similar photo ID requirement. According to a 2006 survey, as many as 18% of Americans over age 65 do not have a driver's license or any other government-issued photo identification card. *See* Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 2, *available at* http://www.brennancenter.org/stack_detail.asp?key=97&subkey=39242&proj_key=76 (November 2006) [hereinafter *Citizens Without Proof*]; *see also* Robert Greenstein *et al.*, Center on Budget and Policy Priorities, *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens* (Sept. 22, 2006), http://www.cbpp.org/9-22-06id.htm. This is substantially higher than the average percentage of American citizens who do not have such documents.[7] These facts suggest that laws like the Indiana Photo ID requirement would place a disproportionate and "particular burden on an identifiable segment" of American voters. *Anderson*, 460 U.S. at 792.

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[7] *See Citizens Without Proof*, *supra* (suggesting that seven percent of Americans nationwide do not have ready access to a government-issued ID).

B. That Indiana Citizens over Age 65 May Vote Absentee Does Not Ameliorate the Need for Older Indiana Voters to Obtain Government-Issued Identification to Fully Exercise Their Right to Vote.

The lower courts dismissed the above-described evidence that a significant number of older Indiana voters do not have photo identification as "tangential," *Rokita*, 458 F. Supp. 2d at 824 n73 (Pet. App. 104 n73,) and irrelevant because "anyone 65 or over can vote by absentee ballot." *Crawford*, 472 F.3d 949, 950 (7th Cir. 2007); *see* Ind. Code § 3-11-10-22(c) (stating that registered voters aged 65 or older may vote by absentee ballot). That argument, however, ignores numerous realities of voting by absentee ballot.

Even for those able to avail themselves of the absentee ballot, absentee voting is not a replacement for in-person voting. If anything, absentee balloting adds additional obstacles and layers of uncertainty to the voting process. Thus, older citizens—who are substantially less likely to have necessary identification—must obtain photo identification to fully exercise their right to vote.

First, the absentee system threatens older voters' right to have their votes counted. In *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963), this Court recognized that a constitutionally protected right exists to have one's vote counted and counted equally—a proposition reaffirmed in recent election cycles. *See, e.g.*, *Bush* v. *Gore*, 531 U.S. 98, 104–05

(2000). As explained in *Sanders*: "Every voter's vote is entitled to be counted once. It must be correctly counted and reported.... '[T]he right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.'" 372 U.S. at 380 (quoting *United States* v. *Mosley*, 238 U.S. 383, 386 (1915)). In *Reynolds* v. *Sims*, 377 U.S. 533, 561–562 (1964), the Court went even further, recognizing this right to have one's vote counted fairly as "fundamental ... in a free and democratic society."

Recent accounts suggest that absentee balloting procedures fail to protect the right to have one's vote counted equally to the same extent as in-person voting procedures. In Marion County, Indiana, alone, newspapers report instances of the election board not counting absentee voters' votes. In 2004, for example, absentee ballots were never counted despite having been cast lawfully and in a timely manner, because the Election Board failed to deliver them to the polling place on time. *See* Editorial, *Go the Distance to Make Each Vote Count*, Indianapolis Star, Nov. 17, 2006. According to Marion County election officials, some absentee ballots are discarded each year because of this problem. *Id.* A lawful ballot that is discarded or ignored is not irrelevant; indeed, news accounts of the election that year confirm that a number of races were close, with one Marion County race being decided by seven votes. *See* Brendan O'Shaughnessy, *Democratic Incumbent Loses by 7*, Indianapolis Star, Nov. 18, 2006, at 1. The loss of one's vote due to an uncounted absentee ballot, therefore, is not a harmless error.

This is a recurring issue. Just two years later, in November of 2006, the Indianapolis Star reported that absentee ballots in Marion County were printed incorrectly, and many were not counted. James A. Gillaspy, *Ballot Error Leads to Call for Resignation*, Indianapolis Star, Oct. 18, 2006. Two candidates' names were left off the absentee ballots, and 250 defective ballots were mailed out to voters. *Id.* This was a disservice not only to the candidates whose names were left off the ballot, but also to the absentee voters who received incorrect ballots and who may not have had the opportunity to cast votes that counted.

Second, absentee voting is not an adequate substitute for in-person voting because voters receive substantially less notice of the procedures for voting in this manner. Because of the lack of clarity—especially where voters are unable to easily ask a question of poll workers as they could if they were voting in person—citizens are not on notice of their rights and responsibilities to the extent allowed when voting in person. In Indiana, absentee voters must deal with archaic and often confusing paper ballots, which create a higher risk of voter error. Recent news reports from Marion County indicate that many absentee voters find the absentee ballot instructions indecipherable and confusing. *See* Rich Van Wyk, WTHR, *Absentee Ballots Cause Confusion* (Updated Nov. 5, 2007), http://www.wthr.com/Global/story.asp?S=7228533. According to one Marion County voter, the cover letter to the ballot and the ballot itself gave conflicting directions. The directions were so

confusing that this registered voter feared he would "spoil[ ]" his ballot by doing the wrong thing. *Id.*

Despite such complaints, the Marion County Election Board has indicated it has no plans to change or clarify these documents to ease the burden on absentee voters, because "these are the instructions [they have] used for years." *Id.* (quoting Marion County Clerk Beth White). Absentee voters must therefore maneuver a confusing voting process with less notice than they would receive if they were allowed to vote in person on Election Day.

Third, voters who must vote absentee are stripped of an important right to have full information when casting their ballots. To ensure that ballots arrive at the local election board on time to be counted – assuming they are handled properly by the election board – voters must mail their ballots at least several days prior to Election Day. *See* Ind. Code § 3-11-10-14 (noting that if an absentee ballot arrives to a precinct after the specified final delivery time, it will not be counted). Absentee ballots, therefore, cannot include last-minute changes to the ballot, nor can an absentee voter's vote reflect consideration of a "late-developing issue" or allow for "new information disclosed about a candidate late in the race." *Burdick* v. *Takushi*, 504 U.S. at 445 (Kennedy, J., dissenting). As such, absentee voting by mail—the only alternative to the photo identification

requirement available to elderly voters—is not a replacement for in-person voting.[8]

II. REQUIREMENTS FOR OBTAINING GOVERNMENT-ISSUED PHOTO IDENTIICATION POSE OBSTACLES THAT CONSTITUTE SEVERE BURDENS ON OLDER VOTERS.

For many voters in Indiana, the process of voting is—as it should be—relatively painless and free. Aside from a modest amount of time spent at the polling location, the average voter pays nothing to exercise the fundamental right to vote.

For many older citizens who wish to exercise their right to vote, however, the story is very different. As shown above, older voters are more likely than other voters to lack the identification that Indiana requires to vote. Moreover, the prerequisites to obtain photo identification pose substantial obstacles for older persons. These obstacles include economic costs borne by all older voters, as well as particular economic and noneconomic costs that affect older voters who are also minorities, women, or disabled.

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[8] If a voter wants to cast an absentee ballot in person, the voter may do so up until noon on Election Day. Ind. Code § 3-11-10-26(d). While this might allow elderly voters to vote on the most current ballot and information, Indiana law requires individuals who cast absentee ballots in person at the clerk's office to present identification in the same manner as a voter who votes in person at the polls, which includes presenting photo identification. *Id.* at 3-11-10-26; 3-5-2-40.5.

Together, these obstacles constitute severe restrictions on the voting rights of older voters.

A. Financial Costs Associated with Obtaining Government-Issued Identification Are Significant for Many Older Voters.

In order to obtain an Indiana driver's license, or identification card, or a U.S. Passport, an applicant must pay one or more fees that he or she would otherwise not be required to remit in connection with voting. The fee for an Indiana driver's license is $19.50. *See* Indiana Bureau of Motor Vehicles, *Driver License Charges*, http://www.in.gov/bmv/fees/driverlicense.htm. While the fee is reduced for residents over the age of 75, the overall financial burden remains similar because older drivers are required by law to renew more frequently than other license holders. Ind. Code § 9-24-12-1; 9-24-12-10. The fees for a U.S. Passport are even more substantial: The basic fee for an adult is $97, and can rise substantially, depending on the speed with which it is required to be obtained. *Passport Application*, *supra* note 4; 22 C.F.R. § 22.1 (2007); *see also* Jane Engle, *Lengthy Delays in Getting New U.S. Passports*, L.A. Times, March 6, 2007 (reporting change in State Department policy requiring up to ten weeks—rather than the normal six week delay—to receive a passport after one applies, and up to three or four weeks or "'possibly longer'" for expedited service instead of the usual two

weeks) (citing Bureau of Consular Affairs, U.S. Department of State, *How Long Will It Take to Process a Passport Application?*, http://www.travel.state.gov/passport/get/processing/processing_1740.html).

Older voters who neither have nor wish to pay to obtain an Indiana driver's license may use a state-issued identification card to vote; however, an applicant for such a card must still pay fees to obtain required official documents, such as a birth certificate. Indiana poses a $10 fee on all Indiana-born citizens -- with no exceptions -- who need a certified birth certificate in order to obtain an identification card. *See* Ind. Code § 16-37-1-11; 16-37-1-11.5. Furthermore, Indiana cannot establish or waive the fees that its citizens who were born out of state may face they attempt to obtain an acceptable birth certificate for purposes of an identification card. Citizens born outside of Indiana, but within the United States, may be required to pay anywhere from $12 to as much as $20 simply to obtain a birth certificate. (Pet. App. at 8.) Naturalized citizens, who must obtain birth certificates from foreign entities may pay even higher fees. *See* Department of Homeland Security, U.S. Citizenship & Immigration Services, *Instructions for N-565, Application for Replacement Naturalization/Citizenship Document* 2 (Expires April 30, 2010), *available at* http://www.uscis.gov/files/form/N-565instr.pdf (providing notice that the fee for a naturalization certificate or a certificate of citizenship is $380).

In reality, the costs associated with a birth-certificate request frequently do not stop at the fee for the certificate itself. The numerous fees and obstacles to obtaining a birth certificate would constitute a severe burden, for example, for an "elderly person who lives in South Bend, but was born in Arkansas." *Crawford*, 472 F.3d at 955 (Evans, J., dissenting) (Pet. App. 13.) In the state of Arkansas, the fee for a birth certificate is $12. Arkansas Department of Health, *Birth Certificate Application*, *available at* http://www.healthyarkansas.com/certificates/vr7_birth_app.pdf. An applicant who must receive a birth certificate more quickly than the standard four- to six-week processing time (*e.g.*, to be able to secure an identification card in time to vote in an upcoming election), or who cannot print the Arkansas application at home, may make an express request by Internet or by phone through a service known as VitalCheck. *See* Arkansas Department of Health, Express Service for Records, http://www.healthyarkansas.com/certificates/certificates.htmll#. However, VitalCheck, as offered on the Arkansas Health Department Web site, entails an additional fee of $8.95. *See* VitalChek Express Certificate Service, http://www.vitalcheck.com (follow "Birth Certificate" hyperlink; select "Arkansas" and complete all fields; follow "Continue" hyperlink). If the applicant needs the birth certificate more quickly than the seven to ten days required for the general express service, he or she must pay an additional $21 fee for expedited delivery.[9] *Id.* The total fees for a

[9] The express service and expedited express service fees must be paid by credit card. *Id.* Thus, many older adults

single older voter, therefore, can exceed $40,[10] well in excess of what courts in Missouri and other jurisdictions have already concluded constitutes a "severe" restriction on the right to vote. *See, e.g.*, *Weinschenk* v. *Missouri*, 203 S.W. 3d 201, 216 (Mo.

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who lack a credit card must forgo this option and wait the month and a half required for mail delivery from the Arkansas Health Department.

[10] A number of other additional costs may add to this total. For instance, to obtain a birth certificate from in Georgia, an individual must pay fees in addition to the cost of the certificate, because the applicant must use either a certified check or money order—payment types for which banks and other institutions often charge a fee—or a credit card through VitalCheck—which imposes an $8.95 fee. Division of Public Health, Georgia Department of Human Resources, Vital Records: Birth Certificates, http://health.state.ga.us/programs/vitalrecords/birth.asp. A California-born voter must include a notarized affidavit attesting to his or her identity with a birth certificate request—a service for which Indiana notaries public may charge a fee. *See* Health and Human Services Agency, State of California, *Application for Certified Copy of Birth Record*, page 1 of 3, *available at* http://www.dhs.ca.gov/publications/forms/pdf/vs111.pdf.; *see also* Ind. Code § 33-42-8-1 (allowing notaries public to charge a fee for services).

Furthermore, because voters who attempt to obtain an identification card likely cannot drive, such voters may incur additional fees in connection with the transportation necessary to make the numerous trips associated with getting the proper documents and the identification card itself. *See* infra Part II, Section B, Subsection 2 (noting that at least four trips to the BMV would be necessary for one older Indiana voter to obtain documentation and identification).

2006) (finding that a $15 fee to obtain a Missouri birth certificate was, without more, a severe burden on certain Missouri voters).

For Indiana residents who were born in certain other states, obtaining a birth certificate may be next to impossible. An older voter born in Georgia, for example, must provide a copy of valid photo identification to obtain a birth certificate. Division of Public Health, Georgia Department of Human Resources, *Vital Records: Birth Certificates*, http://health.state.ga.us/programs/vitalrecords/birth.asp. Where an individual seeks to obtain a birth certificate in order to obtain a photo identification card, the convergence of Indiana's photo ID law with other states' proof-of-identity requirements for a birth certificate may completely sever the individual from their fundamental right to vote—a violation of the U.S. Constitution. *See Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964) (reaffirming that Article I of the U.S. Constitution forbids outright denial of the right to vote).

The myriad costs to obtain government-issued photo identification are likely to hit older voters particularly hard. A significant percentage of older voters live on fixed incomes, often relying on Social Security payments to keep them out of poverty. *See* Center on Budget and Policy Priorities, *Social Security and Poverty Among the Elderly: State Fact Sheets, Indiana* (April 8, 1999), *available at* http://www.cbpp.org/4-8-99socsec-states1.htm#INDIANA. A study found that even with Social Security assistance, one in ten Indiana

residents aged 65 or older live in poverty, a figure confirmed by U.S. Census data. *Id.; see* Current Population Survey, Bureau of Labor Statistics & U.S. Census Bureau, *Annual Social and Economic Supplement, March Supplement* (Last Revised Aug. 29, 2006), *available at* http://pubdb3.census.gov/macro/032007/pov/new46_100125_06.htm. The Indiana AARP survey described in Part I confirmed these findings. Almost 12% of older voters who answered questions about their incomes had incomes below $10,000 in 2004, and almost one-third of respondents had incomes below $20,000 in 2004. *See Indiana AARP Voter Identification Survey, supra.* Fifteen percent of respondents with incomes below $20,000 reported that they lacked a driver's license or other acceptable form of identification. *See id.*

For older voters in low-income brackets, the fees associated with obtaining government-issued identification are anything but trivial. To suggest that those who are unable to pay the many fees associated with obtaining government-issued identification are "disfranchis[ing] themselves" ignores completely the realities of life for many older Americans. *See Crawford*, 472 F.3d at 952 (Pet. App. 5.) Although Indiana law provides that "indigent" individuals may have their vote counted even if they cannot show identification, Ind. Code 3-11.7-5-2.5, this exception will not relieve the burden for all older voters. Individuals who do not consider themselves to be "indigent" may nonetheless live on fixed incomes and may regularly be forced to "go to the bother" of deciding how to allocate a modest income. *See Crawford*, 472 F.3d at 952 (Pet. App. 5.) For those

older voters, the state-imposed obligation to allocate part of a fixed and limited income to fulfill numerous financial prerequisites necessary to obtain a state-issued photo identification is a severe burden on the fundamental right to vote.

B. The Burdens Placed on Older Minority, Women, and Disabled Voters Are Even More Severe.

Older citizens who are also female, disabled, and/or racial or ethnic minorities will face additional—and in some cases insurmountable—difficulties in obtaining a birth certificate. In some situations, such individuals could be completely precluded from voting because of these severe burdens.

1. Older Minority Voters May Not Have Been Issued a Birth Certificate, and Thus May Be Completely Barred from Voting Because They Cannot Obtain Necessary Identification.

Because of historical lack of access to health care for minorities—particularly African Americans—prior to the 1960s, many African-American voters in their 60s, 70s, and 80s are substantially more likely to have been born outside a hospital. *See* S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 Population Studies 86, 99 (1950) [hereinafter *Development of Birth Registration*] (citing Robert D. Grove, Bureau of the Census *Studies in the Completeness of Birth*

Registration, 17 Vital Statistics Special Reports (1943)). As a result, a substantial number of older minority voters likely had little or no access to formal health care or to an agency where a birth certificate would have been issued. *See* Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DePaul J. of Health Care L. 735 (2005) [hereinafter *Tragedy and Remedy*]. One study of births occurring in the United States between December 1939 and March 1940, for instance, found that nearly 23% of all births of nonwhite children occurring out of hospitals were unregistered. *Development of Birth Registration, supra* at 99. Such situation was "particularly serious" because three of four nonwhite infants were born at home. *Id.* Many minority citizens born outside hospitals would thus be significantly less likely to have a birth certificate on file with the state, making it especially burdensome to prove identity in the manner necessary to obtain a state identification card.

Indiana law permits eligible voters aged 65 and older to obtain an identification card without a birth certificate;[11] this exception is insufficient, however, to alleviate the burden on older voters who, while not

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[11] Under this exception, an individual must attest that they have never been issued a birth certificate, and must also present other forms of identification. Indiana Bureau of Motor Vehicles, *Driver License, Frequently Asked Questions*, http://www.state.in.us/bmv/driverlicense/drlicensefaq.htm #5.

yet 65, are unable to obtain a birth certificate.[12] Until the 1960s, substantial segregation persisted in parts of the American health care system, and many African-Americans were denied access to hospitals throughout the first half of the twentieth century. *See Tragedy and Remedy*, *supra*, at 748 (2005). Indiana's "solution," therefore, improperly ignores voters, born in the mid- to late-1940s and even the 1950s, who were not born in a hospital and will not be able to produce the birth certificate they need to obtain a driver's license or state identification card.

2. Women May Face Additional Financial and Logistical Barriers To Obtaining Documentation Necessary for an Identification Card.

For many women, the names listed on their birth certificates will differ from their current names. Under the Indiana photo ID law, the name on the government-issued identification card must exactly match the name on the voter registration rolls. Ind. Code § 3-5-2-40.5(1). If there is a discrepancy, the individual will be forced to obtain a new identification card, or be completely barred from having her vote counted.

Until the mid-1970s, some states actually denied a woman the right to vote if she did not assume the surname of her husband. *See, e.g.*, *Dunn* v. *Palermo*,

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[12] *See* Ind. Code § 3-5-2-16.5 (defining "elderly" as an individual who is at least 65).

522 S.W.2d 679 (Tenn. 1975) (striking down law that required married woman to vote under husband's surname); *Stuart* v. *Bd. of Supervisors of Elections*, 295 A.2d 223 (Md. 1972) (recognizing for the first time a Maryland woman's right to register to vote under her maiden name). A married woman's right to use her maiden name was not even recognized in Indiana until 1974. *In re Hauptly*, 312 N.E. 2d 857 (Ind. 1974). Moreover, in light of the traditional pressures on a woman to take her husband's name, which only started to wane in the 1970s, older women are more likely than younger women to use a married name. *See* Claudia Goldin & Maria Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 18 J. of Econ. Persp. 143, 143–44 (Spring 2004). Many older women voters who seek to obtain a state identification card, therefore, will be required to procure not only a birth certificate, but other official documentation as well, including marriage certificates and name-change documents to ensure that they are able to obtain an identification card that bears their name exactly as it appears on the voting rolls.

These additional requirements for older women mean this group of older voters will face additional economic and noneconomic hurdles to obtaining a birth certificate, on top of those shared by all older individuals. The record below provides the example of Theresa Clemente, an 80-year-old woman who attempted to obtain a state-issued identification card so that she could vote. (J.A. at 93.) On her first visit to the Indiana BMV, she was told she needed a birth certificate. *Id.* On her second visit, she was told that

the copy of her birth certificate was insufficient, because it was not certified. *Id.* Ms. Clemente requested a certified copy from Massachusetts, where she was born, which cost $28 and took two weeks to receive. *Id.*

But Ms. Clemente's birth certificate contained her maiden name, and the BMV officials completed the paperwork for her identification card using that name—not the name on her voter registration card. *Id.* Ms. Clemente noticed the mistake in the paperwork, but BMV officials informed her that she had to present a certified copy of her marriage certificate in order to receive a card that would include her current name, and fulfill the terms of the Indiana photo ID requirement. Securing a marriage certificate required payment of yet another fee – for $15 to the City of Boston, Massachusetts. City of Boston, *Marriage Certificate*, http://www.cityofboston.gov/registry/registermarriage.asp. Like Ms. Clemente, many older women will be forced to pay additional sums and to make multiple trips to the BMV, making the burden associated with the Indiana photo ID law even more severe for them than for all older voters.

3. Older Persons with Disabilities Will Be Particularly Ill Equipped To Handle the Severe Burdens Associated with Obtaining Identification.

In 2002, 72% of Americans aged 80 and older reported having disabilities, as compared to 18% of all Americans. U.S. Census Bureau, *Table 1, Prevalence of Disabilities by Age, Sex, Race, and Hispanic Origin: 2002*, *available at* http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t1.pdf. In Indiana, 78% of voters over the age of 85 reported having a disability, as compared to 16% of the general Indiana population. Center for Personal Assistance Services, University of California San Francisco, *Indiana Disability Table from the 2005 American Community Survey*, Estimates for 2005, http://www.pascenter.org/state_based_stats/state_statistics_2005.php?state=indiana#about (reporting disability rates of 9.8% for ages 18-44; 19% for ages 45-64; and 45% for ages 65 and older for persons in Indiana).

Disabled Indiana voters will face a number of additional burdens as a result of the Indiana photo ID law, in addition to dealing with those faced by all older voters. The consequences of disability include high health care needs that can diminish expendable income. U.S. Census Bureau, *65+ in the United States*: 2005, at 58, *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf [hereinafter *65+ in the U.S.*"] (noting that the cost of medical care for disabled older people is three times that for nondisabled people). Thus the financial burdens faced by all older voters who attempt to obtain necessary documentation for photo

identification cards will be even more severe for disabled voters.[13]

Furthermore, for many older disabled persons, the burdens associated with overcoming the access and mobility challenges that confront all voters who need photo identification to vote are likely to be nothing short of insuperable. Under federal law, a "disability" is variously defined. It may consist of a "physical or mental impairment that substantially limits" an individual's ability to perform "one or more ... major life activities," *see* Americans with Disabilities Act, 42 U.S.C. § 12102(2), where the individual is still "qualified" to work, with or without "reasonable accommodation." *See id.* at 12111(8). It may be even more severe, and cause an individual to be unable to perform "substantial gainful work which exists in the national economy." *See* Social Security Act, 42 U.S.C. 1382c(a)(3)(B). In either case, a "disability" might preclude such basic personal care tasks as bathing, eating, dressing, and even moving out of a bed or a chair. *65+ in the U.S* at 58. Such diverse impairments may be especially significant in limiting voters'—especially older voters'— access to procedures and facilities connected with obtaining a photo ID, perhaps even more so than the impairments limit a person's ability to work, participate in public programs, or visit nearby public accommodations. In the past, a disabled Indiana voter who made the choice to participate to the fullest in the electoral process was, at least prior to enactment of the photo ID law, required to make just

[13] *See supra* Part II, Section A.

one trip to the polls to vote for each election. This might involve a once-annual activity. Yet for many disabled individuals, Indiana's photo ID law requires as many as four trips just to secure the identification required to vote. This is unreasonable, and imposes an onerous burden on any such individual's right to vote.

CONCLUSION

The Indiana photo ID requirement places a severe burden on the fundamental constitutional rights of older voters, and the requirement should therefore be analyzed according to a strict scrutiny standard. For the foregoing reasons, as well as those contained in the petitioner's brief, *Amici curiae* AARP urges that the Seventh Circuit's decision be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

No. 07-21

WILLIAM CRAWFORD, *et al.*,

Petitioners,

—v.—

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

—v.—

TODD ROKITA, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF R. MICHAEL ALVAREZ, LONNA RAE ATKESON, DELIA BAILEY, THAD E. HALL, AND ANDREW D. MARTIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS [POLITICAL SCIENCE RESEARCH]

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are five political scientists who study elections, the electoral process, and voting. Many have studied the impact of voter identification laws like the Indiana law petitioners challenge. Because social science evidence regarding the impact of voter identification laws has played a prominent role in this litigation, *amici* submit this brief to offer the Court a guide to the state of the literature on the subject.

R. Michael Alvarez is Professor of Political Science at the California Institute of Technology. Alvarez has focused most of his research and teaching on the study of electoral politics in the United States. He has published research on electoral behavior and public opinion in the United States and other advanced industrial democratic nations. Together with Delia Bailey and Jonathan Katz, he has recently conducted the most exhaustive study of the impact of voter identification laws to date. *See* R. Michael Alvarez, Delia Bailey & Jonathan Katz, *The Effect of Voter Identification Laws on Turnout* (Oct. 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/media/documents/wps/vtp_wp57.pdf. And together with Lonna Atkeson and Thad Hall, he studied the administration of the 2006 election in New Mexico—including the implementation of the state's voter

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[1] The parties have filed blanket letters of consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6 *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici* and their counsel made a monetary contribution intended to fund its preparation or submission.

identification law. *See* R. Michael Alvarez, Lonna Rae Atkeson & Thad E. Hall, *The New Mexico Election Administration Report: The 2006 November General Election* (Aug. 2, 2007) (unpublished manuscript), *available at* http://www.vote.caltech.edu/reports/NM_Election_Report_8-07.pdf.

Lonna Rae Atkeson is a Professor and Regents' Lecturer in the Political Science Department at the University of New Mexico. She has published studies in a number of fields, including elections, political behavior, and political methodology. She has recently studied racial disparities in the street-level administration of voter identification laws. *See id.* at 54; *see also* Lonna Rae Atkeson, Lisa A. Bryant, Thad E. Hall, Kyle L. Saunders and R. Michael Alvarez, *New Barriers to Voter Participation: Application of New Mexico's Voter Identification Laws* (2007), (unpublished manuscript, presented at the 2007 Annual Meeting of the American Political Science Association), *available at* http://www.vote.caltech.edu/reports/NMvoterid.pdf.

Delia Bailey is a Fellow at the Center for Empirical Research in the Law at the Washington University Law School in St. Louis. She studies and writes about voting behavior, political representation, judicial elections and election reform, as well as empirical research methodologies. She coauthored the recent exhaustive study of the impact of voter identification laws. *See* Alvarez, Bailey & Katz, *supra*.

Thad E. Hall is Assistant Professor in the Department of Political Science and a Research Fellow at the Institute of Public and Interna-

tional Affairs at the University of Utah. He has published research on the administration of elections and the implementation of voting technologies. He is the principal investigator of the Election Assistance Commission's Vote Count and Vote Recount Study, which examines election procedures and laws in all 50 states and the District of Columbia related to voting and vote recounts. He also coauthored the study of the administration of New Mexico's recent election. *See* Alvarez, Atkeson & Hall, *supra*.

Andrew D. Martin is Professor of Political Science and Professor of Law at Washington University in St. Louis. He is the Chair of the Political Science Department in the Faculty of Arts & Sciences and serves as the founding Director of the Center for Empirical Research in the Law in the School of Law. Professor Martin specializes in political methodology, Bayesian statistics, and American political institutions.

SUMMARY OF ARGUMENT[2]

As political scientists who study voting behavior, *amici* begin with their disciplinary first principles: when government policies make the act of voting more costly, they reduce the propensity of otherwise eligible citizens to participate in any given election, all else equal. Petitioners have demonstrated that Indiana's voter identification law makes the act of voting more costly, and the

[2] Counsel for *amici* gratefully acknowledge the assistance in preparing this brief of Ms. Shelly Cohen, an associate at the law firm of Kaye Scholer LLP who is awaiting admission to the bar of the State of New York.

weight of the social science evidence indicates that a law like Indiana's will depress voter turnout, particularly among poor, less educated, elderly, and minority voters. Three types of studies point to this conclusion. First, multiple studies have shown that elderly voters and racial and ethnic minorities are significantly less likely to have government-issued photographic identification than are other voters. Second, a number of other studies, including a recent study coauthored by two signatories to this brief, have shown that the implementation of restrictive voter identification laws depresses turnout, particularly among poorer and less educated voters. Two studies purport to show that restrictive voter identification laws have no such effect, but both those studies have significant methodological flaws. Third, a study conducted by three signatories to this brief has shown that voter identification laws are subject to arbitrary and discriminatory application by poll workers.

ARGUMENT

Laws Requiring Photographic Identification for Voting Impose Severe Burdens on Voters

Amici submit this brief to address two questions: (1) whether the Indiana law requiring voters to present government-issued photographic identification at the polls imposes a significant burden on voting; and (2) whether the Indiana law imposes especial burdens on an identifiable group of voters. Under this Court's precedents, these questions are central to this litigation. *See*,

e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("severe" restrictions on voting are subject to strict scrutiny, while "reasonable, nondiscriminatory restrictions" must be balanced against "the State's important regulatory interests") (internal quotation marks omitted). Both petitioners and respondents point to social science evidence on these questions. As political scientists who have worked extensively in this area, *amici* submit this brief as a guide to the key studies bearing on the questions before the Court.

Amici start with first principles: When government policies make the act of voting more costly, they will reduce the propensity of otherwise eligible citizens to participate in any given election, all else equal. This finding stems from classic works in the discipline, *see, e.g.*, Anthony Downs, *An Economic Theory of Democracy* (1957); William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 Am. Pol. Sci. Rev. 25 (1968), and it has proven remarkably robust in subsequent years. In the decades since the publication of the influential studies by Downs and Riker and Ordeshook, scholars have continued to analyze the costs associated with the act of voting and to demonstrate that increasing those costs is associated with decreasing voter participation.[3]

The extensive research addressing the impact of increasing the cost of voting provides an important context for the arguments in this brief:

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[3] For a recent review of the literature, see Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 Perspectives on Pol. 507 (2004).

Procedural barriers to participation—like the requirement that a voter must present government-issued photographic identification at the polls to exercise his or her franchise—raise the costs associated with voting and, all else equal, will reduce voter participation. In their briefs before this Court, petitioners have amply shown that Indiana's voter identification law imposes substantial costs on a significant fraction of eligible voters. From a political science perspective, there is little doubt that such a law depresses voter participation; the only questions are *how much* of a depressive effect it has and *which segments of the electorate* are likely to be most hampered in participation.

In the balance of this brief, *amici* examine the empirical evidence regarding the effects of requirements that voters show government-issued photographic identification at the polls and the differential administration of those requirements. There are two principal ways a researcher might approach this issue. The researcher might examine how many (and which) eligible voters actually have the identification documents required by the law, or the researcher might examine what happens to voters after the adoption of the law. Scholars have undertaken both of these sorts of studies, and the weight of the evidence bears out what first principles predict: The requirement to present government-issued photographic identification at the polls significantly depresses voter participation, and its bite reaches some segments of the electorate more than others.

A. Racial Minorities and Older People are Less Likely to Have the Photographic Identification Indiana Requires of Voters

There is substantial evidence that racial minorities and older people are less likely to have the kinds of government-issued photographic identification that the Indiana law requires most voters to present at the polls.[4] Three studies, each focusing on a particular state, have examined which groups are more and less likely to have government-issued photographic identification. *See* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* (Nov. 5, 2007) (unpublished manuscript), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.doc (reporting results of a telephone survey of voters in Indiana); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* (Apr. 2007) (unpublished manuscript, presented at the March 2007 Annual Meeting of the Southwestern Political Science Association), *available at* http://www.vote.caltech.edu/VoterID/GAVoterID(Bullock-Hood).pdf (comparing Georgia department of motor vehicles data with data from the state's

[4] Indiana law provides for the following limited exemption from the requirement that government-issued photographic identification be presented at the polls: a "voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." Ind. Code § 3-11-8-25.1(e). Additionally, absentee voters who cast ballots by mail need not provide such identification. *Id.* § 3-11-10-1.2.

voter registration and voter history databases); John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* (June 2005) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/DriversLicense.pdf (comparing data from the Wisconsin state department of motor vehicles with census data).

Each of these studies concludes that the impact of photographic identification requirements falls more heavily on racial minorities, because racial minorities are less likely to have the demanded forms of identification.[5] The Indiana study found that 88.5 percent of white registered voters, as compared to only 81.9 percent of black registered voters, have a government-issued ID that satisfies that state's requirement. *See* Barreto *et al.*, *supra*, at 8 tbl.1. Regression analysis confirmed the racial skew. *See id.* at 13 tbls. 3-4. The Georgia study similarly found that "[i]n comparison to white registrants, all four racial/ethnic categories included in the model have a significantly higher probability of not possessing either a driver's license or state identification card." Hood & Bullock, *supra*, at 14. Notably, black regis-

[5] Yet another study, based on exit polls from the 2006 elections in California, New Mexico, and Washington State, found that minority voters are less likely than whites to be able to present a driver's license and one other identification document at the polls. *See* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisement of Latino, Black, and Asian Voters* 1 (Sept. 1, 2007) (unpublished manuscript, presented at the 2007 Annual Meeting of American Political Science Association), *available at* http://www.vote.caltech.edu/VoterID/apsa07_proceeding_209601.pdf.

trants were more than 83 percent more likely than white registrants not to possess such an identification, and Hispanic registrants were nearly *twice* as likely as whites not to possess such an identification. *See id.* at fig. 1. And the Wisconsin study also found a significant racial skew. *See* Pawasarat, *supra*, at 3 ("Statewide, the percent of Wisconsin residents with a valid driver's license is 80 percent for males and 81 percent for females. For African-Americans, only 45 percent of males and 51 percent of females have a valid driver's license. Hispanics show 54 percent of males and only 41 percent of females with a valid driver's license.")[6] Each study also found that elderly voters are also significantly less likely to have the government-issued photographic identification that the Indiana statute demands of voters. *See* Barreto, *et al.*, *supra*, at 8 tbl. 1; Hood & Bullock, *supra*, at 14 fig. 1; Pawasarat, *supra*, at 11.

In short, evidence from both voter surveys and state records shows that racial minorities and elderly individuals are significantly less likely to have government-issued photographic identification. When a state law, like Indiana's, requires voters to present identification in order to cast a ballot, it will predictably depress the voting rates of racial minorities and elderly individuals.

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[6] The Georgia and Wisconsin studies examined state-issued identifications only; they did not examine the racial skew in possession of military identification. Although that is a limitation of those studies, it is only a minor one. Individuals who are serving in the military are likely to have drivers' licenses as well, so the failure to count military identifications is unlikely to have changed the results of these studies in any material way.

B. Stringent Voter Identification Requirements Have Been Shown to Depress Voting, Especially Among Individuals with Less Education and Income

Other studies have looked directly at what has happened when states have implemented stringent voter identification requirements. The newest and most sophisticated of these studies is coauthored by two of the signatories to this brief. *See* Alvarez, Bailey & Katz, *supra*. Alvarez, Bailey, and Katz use data from the Census Bureau's Current Population Survey (CPS) to "document[] the effect of voter identification requirements on registered voters as they were imposed in states in the 2000 and 2004 presidential elections, and in the 2002 and 2006 midterm elections." *Id.* at 2. In order to control for the many factors unrelated to voter identification laws that cause turnout rates to vary among states, and to control for the cyclical changes in turnout that all states will experience from year to year, they use what is called a "multilevel" or "random effects" model. *Id.* at 10.

Applying their model to individual-level data from the CPS, Alvarez, Bailey, and Katz find that the imposition of a voter identification requirement has a significant and negative effect on turnout. *See id.* at 16. The imposition of a requirement of photographic identification, they find, has the largest negative effect of all of the voter identification requirements on the probability that an individual will vote. *See id.* at 17. Restrictive voter identification laws have particularly significant effects on people with less education and lower incomes. *See id.* at 18-20.

But, *independent* of those effects, Alvarez, Bailey, and Katz find that the laws have no effect on the turnout of nonwhite voters. *See id.* at 18 ("*Controlling for the factors usually seen in models of voter participation*, we see no evidence that voter identification [requirements] are racially discriminatory.") (emphasis added); *id.* at 19 ("[W]e find no evidence to support the hypothesis that this effect is more profound for nonwhite registered voters, *controlling for other variables, especially income and education*.") (emphasis added).

In other words, restrictive voter identification laws may depress the probability that some groups of nonwhite voters will cast ballots (as other studies have found[7]), but they do so because nonwhite voters in those groups tend to have less education and lower incomes than white voters. *See* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2006*, at 7 (Aug. 2007), *available at*

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[7] *See* Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Laws on Turnout* (2006) (unpublished manuscript, presented at the 2007 Annual Meeting of the American Political Science Association), *available at* http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf (finding that more stringent voter identification requirements disproportionately reduce the turnout of Latino voters). Vercellotti and Anderson's study also concludes that the implementation of some forms of identification requirements (signature matches and non-photo identification provision) reduced voter participation. But the study examines data from only one election, which limits both the study's sample size and the degree to which one can draw causal conclusions from it. *See* Alvarez, Bailey & Katz, *supra*, at 4-6 (describing methodological differences with the Vercellotti and Anderson study).

http://www.census.gov/prod/2007pubs/p60-233.pdf ("Black households had the lowest median income in 2006 among the race and Hispanic-origin groups, $31,969, which was 61 percent of the median for non-Hispanic White households, $52,423. . . . Median income for Hispanic households was $37,781 in 2006, which was 72 percent of the median for non-Hispanic White households."); Nat'l Center for Educ., *Statistics, Status and Trends in the Education of Racial and Ethnic Minorities*, 122-23 (2007), *available at* http://nces.ed.gov/pubs2007/2007039.pdf (showing that whites on average score higher on measures of educational attainment than blacks, Hispanics, or Asian-Pacific Islanders); *cf. Hunter v. Underwood*, 471 U.S. 222, 231-32 ("moral turpitude" law that was intended to disenfranchise blacks and poor whites was intentional race discrimination in violation of the Fourteenth Amendment).

Two studies purport to show that restrictive voter identification laws do not suppress turnout, but they do not undermine the conclusions of the Alvarez, Bailey, and Katz study. One study, prepared by John Lott, analyzes county-level data for general and primary elections from 1996 through 2004. *See* John R. Lott, Jr., *Evidence of Voter Fraud and the Impact That Regulations To Reduce Voter Fraud Have on Voter Participation Rates* (Aug. 18, 2006) (unpublished manuscript), *available at* http://www.vote.caltech.edu/VoterID/ssrn-id925611.pdf. Lott's aggregate data analysis finds no evidence that the voter photo identification requirements *in place during that period* decreased voter participation rates, but

neither the Indiana law at issue in this case nor any law strictly requiring that photo identification be presented to cast a valid ballot was in place during the period Lott studied. Lott himself notes that "it is still too early to evaluate any possible impact of mandatory photo IDs on U.S. elections." *Id.* at 11.

Another recent analysis uses the 2000, 2002, 2004, and 2006 American National Election Studies (NES) to measure the effect of voter identification requirements on turnout in federal elections. *See* Jason D. Mycoff, Michael W. Wagner, & David C. Wilson, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* (unpublished manuscript, presented at the 2007 Annual Meeting of the American Political Science Association), *available at* http://www.vote.caltech.edu/VoterID/apsa07_proceeding_211715.pdf. Mycoff, Wagner, and Wilson, like Lott, conclude that voter identification requirements have no effect on turnout. But their study has significant flaws. For one thing, although the authors utilize data from the same four recent federal elections as do Alvarez, Bailey, and Katz, they analyze each year separately. As a result, they cannot isolate whether a state's change in identification requirements has caused a drop in turnout. More important, the NES data used by Mycoff, Wagner, and Wilson are far less reliable than are the CPS data used by Alvarez, Bailey, and Katz. In particular, the NES data substantially overreport turnout compared to the CPS data.[8]

[8] For an explanation of the methodological flaws in the Mycoff, Wagner, and Wilson study, *see* Alvarez, Bailey & Katz, *supra*, at 5 & n.4.

In short, the balance of the evidence suggests that restrictive voter identification laws, like Indiana's law that requires voters to present government-issued photographic identification at the polls as a condition of exercising their franchise, do impose significant obstacles to voting. The studies that suggest the contrary are methodologically flawed. And those obstacles are especially significant for certain groups—people with low incomes and less education, and (derivatively) racial and ethnic minorities. This Court should accordingly conclude that the Indiana voter identification law does not impose merely "reasonable, nondiscriminatory restrictions" on voting. To the contrary, the restrictions it imposes are "severe," particularly for those demographic groups most affected by it. *Cf. Burdick*, 504 U.S. at 434.

C. Voter Identification Laws are Subject to Arbitrary and Discriminatory Application by Poll Workers

The evidence also suggests that voter identification laws are subject to arbitrary and discriminatory application at the polling place level—a concern that has pervaded this Court's voting cases. See, *e.g.*, *Bush v. Gore*, 531 U.S. 98, 105-08 (2000) (*per curiam*) (invalidating rules for counting ballots because they lent themselves to arbitrary application); *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, J., concurring in part and dissenting in part) (upholding nationwide literacy test ban because Congress could have concluded that "racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory appli-

cation, either conscious or unconscious"); *South Carolina v. Katzenbach*, 383 U.S. 301, 312-13 (1966) (discussing extensive evidence of discriminatory administration of literacy tests).

A study of the implementation of New Mexico's voter identification law in the 2006 election found that—despite receiving training from election administrators—polling places and even individual poll workers varied widely in their application of that law. *See* Alvarez, Atkeson & Hall, *supra*, at 25; *See* Atkeson, Bryant, Hall, Saunders & Alvarez, *supra* at 13-14 tbls. 1, 2. And the law provided the occasion for racial and ethnic discrimination at the polling place level—voters who self-identify as Hispanic or who have Hispanic surnames were significantly more likely to be asked by poll workers for identification than were other voters. *See* Alvarez, Atkeson & Hall, *supra*, at 54; *See* Atkeson, Bryant, Hall, Saunders & Alvarez, *supra*, at 18-20.

The evidence therefore suggests that, in addition to the disparate burdens voter identification laws *inherently* place on voters, the implementation of those laws by poll workers on election day will introduce additional arbitrariness and discrimination. This point further underscores the unconstitutionality of Indiana's requirement that voters present photographic identification at the polls to cast a valid ballot.

CONCLUSION

The judgment of the court of appeals should be reversed.

November 13, 2007

Respectfully submitted,

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AMICUS CURIAE BRIEF

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On Writs of Certiorari to United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded by former Reagan White House Policy Advisor Robert B. Carleson in 1998, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may be politically correct or advance a particular ideology. We want to ensure, in this case in particular, that the voting rights of legitimate voters not be infringed by voter fraud.

All parties have consented to the filing of this brief under blanket consents filed with the Court.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

In 2005, the Indiana General Assembly passed legislation, signed by the Governor, to counter voter fraud by generally requiring those voting in person at the polls to identify themselves with a government issued photo ID, such as a drivers license or a passport. The Indiana state Democratic Party, the Marion County Democratic Party, two elected Democrat officials, and several political interest groups filed suit alleging that this Indiana Voter ID law is unconstitutional because requiring such an ID imposes a severe burden on the right to vote.

The District Court consolidated the cases brought by the above parties and upheld the law, holding that requiring such ID at the polls was not a severe burden on the right to vote. The Seventh Circuit affirmed on appeal, finding that any burden on voting was slight and that the plaintiffs had not produced one person who could not vote because of the new law. This granted the requested writ of certiorari.

SUMMARY OF ARGUMENT

No one has been denied the right to vote by the Indiana Voter ID Law. The record clearly establishes without challenge that 99% of the Voting Age Population in Indiana already has the required ID, in the form of driver's licenses, passports, or other identification.

Of the remaining 1%, senior citizens and the disabled are automatically eligible to vote by absentee ballot, and such absentee voting is exempt from the Voter ID Law. Ind. Code Sects. 3-11-10-24a; 3-10-1-7.2(e);3-11-8-25.1(f);3-11-10-1.2. Members of these groups are the most likely not to have driver's licenses or passports, and they most likely account for the great majority of that remaining 1%.

Under Indiana law, the poor can obtain a voter ID for free from the Bureau of Motor Vehicles. Ind, Code Sections 9-24-16-10(b); 9-24-16-10(a). Those who do not have the necessary documentation, such as a birth certificate, and are too poor to pay any fee to obtain it, are also exempt from the voter ID requirement. They can cast a provisional ballot on Election Day and within 10 days sign an affidavit that they are indigent and cannot obtain proof of identification without payment of a fee. Ind. Code Sects. 3-11.7-5-2.5;3-11.7-5-1; 3-11.7-5-2.5(c).

Of the remaining fraction of 1%, those not registered cannot vote anyway, so they are not burdened by the requirements of the Voter ID Law either. Those who choose not to vote are also not burdened by the law. In recent elections, 25% to 40% of the voting age population did not vote, even before any effects of the Voter ID Law.

This explains why the Petitioners could not come up with one person in the proceedings below who has been denied the right to vote under the new law.

The Petitioners' claim that the requirements of the Voter ID Law constitute a "severe burden" on the right to vote amounts to nothing more than an argument that the fraction of 1% who do not already have the required ID, are not exempt from the law, and are registered to vote, cannot be bothered to deal with the paperwork to acquire an ID. This is so even though that paperwork burden is no greater than the burden imposed to obtain a driver's license.

But as the Seventh Circuit wisely noted below, "the right to vote is on both sides of the ledger" in this case. Pet. App. 6. That is because legitimate legal voters also have a constitutional voting right not to have their votes canceled out by voter fraud. In this context, the slight burden of additional paperwork for a fraction of 1%, to show who they are and

thereby prove their eligibility to vote, cannot come close to outweighing the interests of all legitimate legal voters in maintaining their effective vote. In any event, there is no "severe burden" on the right to vote as no one is denied the right to vote because of the Voter ID Law.

Moreover, precisely because no one is denied the right to vote under the voter ID law, the law does not impose a discriminatorily severe burden on senior citizens, the disabled, or the poor. Indeed, these very groups are exempt from the voter ID requirements of the law. And if there is no discrimination against these groups, then there is no discrimination against African-Americans or other minorities, which is presumed by the Petitioners because of the supposed higher representation of these minorities among the poor in particular.

In addition, what the Constitution actually requires in this case is deference to the determination of the Indiana legislature on the balance of interests at stake. The Indiana legislature has determined that the slight additional paperwork burden on a fraction of 1% to show who they are and thereby prove their eligibility to vote does not outweigh the constitutional interest of all legitimate legal voters in maintaining their right to vote in an election where their vote will not be nullified by voter fraud. Under the Elections Clause of the Constitution, Art. I, Section 4, clause 1, the power to make this determination in the first instance belongs to the states. When the resulting law does not by its own terms deny anyone the right to vote, there is no basis for this Court to step in and overturn that determination.

Petitioners' excessively repetitious briefs repeat over and over that no one has ever been prosecuted for voter fraud in Indiana. But the legislature does not have to wait until voter fraud makes a mockery of the state's elections to determine the balance of interests as discussed above.

Moreover, the Guarantee Clause of Article IV, Section 4, guaranteeing citizens a Republican form of government, should be recognized by this Court as establishing a Constitutional Principle of Federalism. Under that principle, the Federal courts would show deference to the balances struck by elected state legislatures, absent a sufficiently clear showing of a violation of Federal Constitutional rights. Where no one is actually denied the vote by the Voter ID law, there is no such showing of such a constitutional violation.

Finally, Judge Evans in dissent below states, "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election day turnout by certain folks believed to skew Democratic." Pet. App. 11. An equally partisan, non-judicial rejoinder would be: Let's not beat around the bush, opposition to the Indiana voter photo ID law is a not-too-thinly-veiled attempt to maintain the opportunity for voter fraud.

ARGUMENT

I. NO ONE IS DENIED THE RIGHT TO VOTE UNDER THE INDIANA VOTER ID LAW.

It was Plaintiffs' own expert witness, Kimball Brace, who established that 99% of the voting age population in Indiana already has the ID required by the Indiana law. Pet. App. 61, 69. This is not challenged by Petitioners.

Of this 1%, all those who are over age 65, or disabled, are exempt from the Voter ID requirements. That is because these voters are all entitled to vote by absentee ballot under Indiana law, and the Voter ID requirements do not apply to absentee ballots. . Ind. Code Sects. 3-11-10-24a; 3-10-1-7.2(e);3-11-8-25.1(f);3-11-10-1.2. Those over 65 and the

disabled are more likely than the general population to be physically unable to drive, and so are more likely not to have driver's licenses. As a result, they are likely to constitute a higher proportion of this 1% than of the general population.

Of the remaining fraction of the 1%, those who are poor can get a government ID for free from the Bureau of Motor Vehicles. Ind, Code Sections 9-24-16-10(b); 9-24-16-10(a). Those who do not have the necessary documentation for such a free ID, such as a birth certificate, and are too poor to pay any fee to obtain it, are also exempt from the voter ID requirement. They can cast a provisional ballot on Election Day and within 10 days sign an affidavit that they are indigent and cannot obtain proof of identification without payment of a fee. Ind. Code Sects. 3-11.7-5-2.5;3-11.7-5-1; 3-11.7-5-2.5(c). The poor, consequently, are not prevented from voting under the Voter ID Law either.

Of the remaining, those not registered cannot vote anyway, so they are not burdened by the requirements of the Voter ID Law either. Those who choose not to vote are also not burdened by the law. In recent elections, 25% to 40% of the voting age population did not vote, even before any effects of the Voter ID Law. C.A.7 State App. 63; J.A. 177.

So who would be suffering a "severe burden" on the right to vote due to the Voter ID Law?

No wonder the Petitioners were not able to identify a single citizen who was denied the right to vote by the Indiana Voter ID Law. And no wonder that scientific studies show no effect of the Voter ID Law in suppressing voter turnout. Jeffrey Milyo, Inst. of Pub. Policy, Report No. 10-2007, *The Effects of Photographic Identification On Voter Turnout in Indiana: A County-Level Analysis* (Nov. 2007); John R. Lott, Jr., *Evidence of Voter Fraud & the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates,* (August

18, 2006)("It does not appear that there is anything systematic about being African-American, female or elderly that causes one to be adversely impacted by Photo IDs" Id. at 12). Indeed, some find an adverse impact on white but not black or Hispanic turnout. Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It?: The Effects of Voter Identification Laws on Turnout,* Presentation to Am. Political Science Ass'n (Sept. 2006); R. Michael Alvarez *et al,. The Effect of Voter Identification Laws on Turnout* (Cal. Inst. of Tech,. Social Science Working Paper No. 1267, Oct. 2007)("no evidence that voter identification requirements are racially discriminatory" Id. at 19,)

A few of the 1% that don't already have sufficient ID may have to get birth certificates from a faraway state. But with modern communication by phone, fax and internet, that should not be too difficult. They need to focus on that issue in advance and get the paperwork done. Once they get the certificate, it is permanent proof of their identity that they can keep in a safe place. They are going to have to get that birth certificate anyway if they are ever going to get a driver's license or a passport.

A few born overseas in a country that doesn't keep good records may suffer the lack of a birth certificate. But they will have immigration documents such as a certificate of immigration to prove who they are.

Even for the homeless, a voter registration card constitutes proof of address. 140 Ind. Admin. Code, Sect. 7-4-3(e)(7). Any registered homeless individual can use that card for proof of residence to obtain a free ID. Or he can swear out an affidavit claiming indigency.

As the District Court below held, "despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any

identifiable registered voter who would be prevented from voting" by the Voter ID Law. Pet.App. 101. That's because the law by its own terms does not deny the right to vote to anyone.

II. UNDER THE WELL-ESTABLISHED PRECEDENTS OF THIS COURT, THE INDIANA VOTER ID LAW IS CLEARLY CONSTITUTIONAL.

The legal standard that applies to this case was established in *Anderson v. Celebreeze,* 460 U.S, 780 (1983) and *Burdick v. Takushi,* 504 U.S. 428, 432 (1992). In general, the constitutionality of a state's procedural requirements for voting is determined by a balancing test, weighing the burden on the right to vote against the state interests behind the procedural requirements. But where a "severe burden" is imposed on the right to vote, strict scrutiny is applied. To pass strict scrutiny, the procedural requirement must serve a compelling state interest, and must be narrowly tailored to be the least restrictive requirement necessary to serve that interest. .

This legal standard was further explained in *Burdick,* where the Court noted that it has long rejected "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." Rather, as the Court said in *Clingman v. Beaver,* 544 U.S. 581, 583 (2005),

> "To deem ordinary and widespread burdens...severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of states to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question 'that states may. And inevitably must, enact reasonable regulations of parties,

elections, and ballots to reduce election and campaign-related disorder "

Precisely because no one is denied the right to vote by the Indiana Voter ID Law, as discussed in Section I above, that law does not impose a severe burden on the right to vote. The law requires at most a slight paperwork burden on the fraction of 1% of the state's voting age population that does not already have the required ID, are not exempt from the law, and are registered to vote. **That paperwork burden is no greater than the burden imposed to obtain a driver's license.**

In *Rosario v. Rockefeller,* 410 U.S. 752 (1973), the Court upheld a law imposing a deadline for enrollment as a member of a party before voting in the party's primary, with the deadline well in advance of the primary date. Regarding those who failed to meet the deadline and were consequently excluded from voting in the primary, the Court said, "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by the law, but by their own failure to take timely steps to effect their enrollment." Id. at 758.

Similarly, in the present case, the Indiana Voter ID Law by its own terms does not exclude anyone from voting. All can vote if they just follow the law's procedural requirements. The law requires documentation of the identity of the voter, with broad exceptions anywhere that the burden of such documentation becomes at all substantial, such as for the elderly, the disabled, and the poor. Again, 99% of the voting age population already has the required documentation, and so is not affected by any burden from the law. Because of the broad exceptions and other factors discussed in Section 1, most of the rest are not affected either. For those that are affected, again, the burden is no greater than the paperwork burden required to obtain a driver's license. As in *Rosario,* voting will be affected only for those

few who fail to follow the law's reasonable and modest requirements.

As the Seventh Circuit noted below, on the other side of the ledger in this case, the state interest behind the Voter ID Law, is also the constitutional right to vote. The Court said,

> "The purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote."

Pet. App. 6.

The Court went on to balance the interests by stating the burden on voting imposed by the Voter ID Law "so far as the record reveals, is slight." Pet. App. 7. The Court went on to say,

> "On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at the polls claiming to be someone else—someone who has left the District, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature."

Pet. App. 7.

The danger of the multiple voting the Court discusses here is particularly acute since the voter registration rolls in Indiana are overinflated by more than 40%, among the

highest in the country, with ineligible names, invalid registrations and double counting. J.A. 177-78; 184. But another potential source of illegal voting is the 12 to 30 million illegal aliens across the country. Interestingly, the alternatives to the Voter ID Law advanced by Petitioners are all vulnerable to voting by illegal aliens. Signature comparisons are to no avail if the same illegal alien signed in both places. Moreover, illegal aliens get utility bills and bank statements as well, so using such documents for ID would not preclude illegal aliens from voting. Only government issued IDs such as driver's licenses and passports would exclude voting by illegal aliens.

The bottom line on the balancing test is that the slight burden of additional paperwork for a fraction of 1% of the Voting Age Population, to show who they are and thereby prove their eligibility to vote, cannot come close to outweighing the constitutional interests of all legitimate, legal voters in maintaining their right to vote in an election where their vote will not be nullified by voter fraud. That is all the more so when that paperwork burden is no greater than the burden imposed to obtain a driver's license.

Petitioners argue repeatedly that there has been no instance of voter fraud ever prosecuted in Indiana. But, besides the difficulties in discovering voter fraud discussed by Judge Posner above, the state does not have to wait until voter fraud makes a mockery of its elections before taking action. As this Court said in *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986), the Constitution does not "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." Rather, "[l]egislatures...should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutional rights." Id.

Finally, Petitioners embark on a fantastic adventure with their last ditch effort to justify strict scrutiny by claiming that the Voter ID Law has a discriminatory impact on voting. They have tried to argue that the law discriminates against the elderly, the disabled, and the poor. They have then tried to argue that blacks, other minorities, and Democrats are more heavily represented among these groups, and so the law discriminates against them as well.

But, again, the law exempts precisely the elderly, the disabled, and the poor from its voter ID requirements. So the whole house of cards collapses on this point. How can the law discriminate against those to whom it doesn't apply?

That is why scientific studies again show no discriminatory impact, as discussed above. Even the study by the Petitioners' own expert failed to show discrimination, and was thrown out by the district court for its intellectual weaknesses, with the expert saying on the witness stand, "Basically, we could not conclude one way or the other in terms of the distinction in terms of racial categories." J.A. 279.

III. THE CONSTITUTION REQUIRES DEFERENCE TO THE BALANCE STRUCK BY THE ELECTED INDIANA OFFICIALS.

The Elections Clause of the U.S. Constitution is found in Article I, Section 4, Clause 1, which states,

> "the times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such

regulations, except as to the places of choosing Senators."

This Clause grants the power to make the decisions regarding regulation of elections, including the issues in this case, to the states in the first instance. Moreover, Congress retains the power to step in and change policies it deems inappropriate in regard to Federal elections.

Because this Clause explicitly grants such power to the states, this Court should show deference to the decisions and balance of interests determined by the states. Deference does not mean abdication. If a state's election regulations clearly violate constitutional rights, then the courts retain the power to correct that violation.

But where, as in this case, the challenged state law does not by its own terms deny anyone the right to vote, there is no basis for this Court to step in and overturn the balance of interests determined by the state legislature in the challenged law. For example, for this Court to decide that not enough election fraud has been found in Indiana for the state to take the step of requiring government issued IDs, such as driver's licenses, to stop that fraud would not be showing deference. Petitioners can always return to the state legislature to argue for relief, or, in the case of Federal elections, to Congress, where the Democratic Party represented by at least two of the Petitioners holds the majority.

This injunction for deference is reinforced by the Constitution's Guarantee Clause in Article IV, Section 4. That Clause guarantees American citizens "a Republican Form of government" which means s form of government based on popular sovereignty in which decisions are made by elected officials. One such decision is the Indiana Voter ID Law challenged in this case.

The Court should recognize the Guarantee Clause as embodying a Constitutional principle of Federalism, or deference to decisions made by elected officials in the states. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988). This deference would, again, not be unlimited. Where a state's actions or laws clearly violate constitutional rights, this Court must, of course, continue to step in and correct those violations. But short of such constitutional violations, the Court should at least start with the determinations of elected state officials and uphold them where possible.

Unfortunately, this Guarantee Clause came before the Court in a case arising soon after the Civil War, *Georgia v. Stanton*, 74 U.S. 700 (1869). The case challenged the Reconstruction Laws imposed on the defeated states of the Confederacy, based on the Guarantee Clause. At that time, there was not much support for deference to the rebellious states which had caused a Civil War lasting 4 years resulting in the deaths of hundreds of thousands of Americans, with untold destruction. The Court held in that case that the Guarantee Clause provided only a non-justiciable political principle, not a constitutional right. The Guaranty Clause has been mostly a dead letter since that time.

More recently, however, this Court raised, without deciding, the possibility that the Guarantee Clause could be justiciable as a constraint on federal power to regulate the activities of the states. In *New York v. US*, 488 US 1041, New York and two of its counties filed suit against the United States challenging radioactive waste disposal laws passed by Congress, contrary to the laws of certain states, based on the Tenth Amendment and the Guaranty Clause.

This Court said, in an opinion applicable to the present case as well,

> "Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1, 63 (1936)."

Id.

The Court ruled for the Plaintiffs based on the Tenth Amendment. But in regard to the Guaranty Clause, the Court said, " More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." Id..

The principle of Federalism has deep roots in our nation's law and history. Justice Brandeis wrote the pragmatic defense of federalism in his celebrated dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). After his famous statement referring to the states as the legislative laboratories of the nation, Brandeis wrote,

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is

> arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Id.

This is an essential fact of the federal design of American governments. Within lenient bounds, the states must be free to fashion their own responses to legal problems which may be present in many states.

Exactly as the pattern now present on voter IDs, states may take diverse approaches to a problem. Some may be strict, seeing the problem as grave. Others may be lenient, seeing the problem as negligible. In the fullness of time, experience will demonstrate which state laws have been successful, and which have failed. States which are later to act can avoid the failed policies and duplicate the successful ones.

Ultimately, Congress may choose to act on this subject. It, too, will benefit from the legislative experiments at the state level.

This is a well-established pattern. Subjects as important as the Constitution itself grew from an examination of the preceding constitutions of the colonies and the states, with certain elements drawn from state constitutions – including the First Amendment from the Massachusetts Charter, and certain elements rejected – such as the Pennsylvania Council of Revision, which was given the power to strike down or amend duly passed legislation.

The *Federalist*, by James Madison, Alexander Hamilton and John Jay, provides examples throughout of how the Framers in Philadelphia examined the examples both of the states, and of various types of government throughout human history, in choosing the elements that should, and should not, appear in the document they were drafting. Although many commentators stress the political philosophies behind the discussions and decisions at Philadelphia, examination of facts – of competing examples of how to design government structures that will serve the needs and will stand the test of time – was also essential to the process. Perhaps that design was more important than the philosophy, because the US Constitution is the longest surviving written constitution among all the nations of the world.

Lesser examples include the Interstate Commerce Commission, which was drawn from prior state experiences with regulation of railroads, welfare laws, workman's compensation laws, and regulation and funding of education. These and many other issues began with fits and starts, some successful but some failures, in individual states.

The same freedom of action for states in writing their election laws is important in this case. By upholding the Indiana law, this Court will leave the door open for other states to learn from the Indiana example. If it works well, so be it, and it will spread to more states than the few who have passed photo voter ID laws to date. If it works poorly, other states will not copy it, and in time Indiana itself may drop it.

Finally, an example of the wrong approach to Federalism is provided by Judge Evans in his dissent below. At the end of his third paragraph he asks, rhetorically, "Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table?"

The image is, of course, overblown. The Indiana voter ID law is not a sledgehammer. And the entire structure of Indiana elections will not come crashing down if this law is upheld. The dangerous part of this statement lies in the first three words, "Is it wise...."

The wisdom of any piece of legislation is not the business of any federal court. Whether a given law is wise is determined first by the elected representatives who pass that law, whether state or federal. And if the voters decide that law is unwise, the corrective step is for them to defeat those representatives at the next election, and install new representatives with a different view of the wisdom of that legislation.

The fact that second-guessing legislative decisions is not the business of the courts, is shown by the *Federalist* concerning the design of the federal judiciary. In No. 78, Alexander Hamilton describes the federal judiciary as "the least dangerous branch." He writes:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either ht sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the

executive arm, even for the efficacy of its judgments. [Emphasis in the original.]

In this case, Petitioners insist that this Court should take away from the State of Indiana the "Republican Form of Government" which the Constitution guarantees. We respectfully submit that the opposite conclusion is the correct one. This Court should affirm the right of Indiana to enact election laws for its own citizens.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should affirm the decisions of the courts below.

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AMICUS CURIAE BRIEF

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Nos. 07-21, 07-25

IN THE SUPREME COURT
OF THE UNITED STATES

WILLIAM CRAWFORD, ET AL., *Petitioners*

v.

MARION COUNTY ELECTION BOARD, ET AL., *Respondent*

INDIANA DEMOCRATIC PARTY, ET AL., *Petitioners*

v.

TODD ROKITA, ET AL., *Respondent*

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Affirmance

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

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INTEREST OF AMICUS CURIAE

All parties seem to agree that voting fraud can be addressed by appropriate legislation, but the parties differ on whether in-person voter fraud actually occurs. *Amicus* wishes to address this area, and present to the Court information which suggests that this problem is significant and growing.[1]

The American Unity Legal Defense Fund is an independent, national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century. The American Unity Legal Defense Fund defends human and civil rights, including the rights of American citizens whose votes may be diluted by non-citizen voters. AULDF joined an *amici curiae* brief in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations).

PRELIMINARY STATEMENT

This is a very strange – and dangerous – case. Petitioners and their supporters have marshaled enormous research and scholarly resources, hundreds of pages of briefing and numerous advocacy groups, all of which proclaim unanimity that "in-person voter impersonation fraud" – which

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[1]The parties have consented to the filing of amicus briefs in support of either party. Pursuant to Rule 37.6, *amicus* certifies that no person or entity other than *amicus* made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

they contend is the only problem addressed by the statute in question – "does not exist."

Yet, in a few days after reading the opening briefs, *amicus* here – who has no special expertise in this area, no history of involvement in this issue, and a minuscule amount of research resources – has uncovered several instances of clear, documented "in-person voter impersonation fraud" in the first city it examined. (That information is described *infra*.)

Amicus AULDF had intended to address only the significant and growing problem of non-citizen voting fraud and how the Indiana statute would likely help prevent or uncover that fraud. After reading the opening briefs, however, *amicus* expanded its research and quickly determined both that "in-person voter impersonation fraud" exists, and that the Indiana statute actually protects far more than addressed by the opening presentations.

Moreover, many of the briefs contain emotion, over-statement, exaggeration, hatred and bile, culminating, perhaps, in the absurd proposition that the Indiana statute must be struck down because an Arizona initiative proponent dislikes bilingual ballots, an opinion an advocacy group finds racist and abhorrent. Brief for *Amicus Curiae* Mexican American Legal Defense and Educational Fund In Support of Petitioners, at 11; *but see, Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997)(dismissing as moot a challenge to successful Arizona ballot initiative declaring English the official language). Thus, the opening presentations

which challenge the lower courts' finding that fraud exists apparently don't apply the same level of skepticism to claims that it does not.

The danger in this case is not just from the supposed evils depicted in the opening presentations. As shown by the monumental increase in the number of *amici* briefs in recent cases, briefers know the aphorism "whoever defines the terms of a debate, wins." This Court must guard also against incomplete and misleading arguments, particularly in a highly-controversial case, where the sheer volume of shouting may obscure flaws. Otherwise serious briefing may degenerate into blogosphere screaming in some of the most important cases.

SUMMARY OF ARGUMENT

The parties differ on whether "in-person voter impersonation fraud" exists. The lower courts found that election fraud existed and provided a sufficient basis for the challenged statute. Petitioners, on the other hand, contend that such fraud "does not exist" either in Indiana or elsewhere.

Yet, the 2004 elections in Albuquerque, New Mexico demonstrates both several actual incidents of "in-person voter impersonation fraud" which cost citizens their votes, and other forms of voter impersonation fraud. *Amicus* does not suggest that New Mexico or Albuquerque are hotbeds of election illegality; this was simply the first place *amicus* reviewed the available data.

Some Albuquerque frauds appear plainly in the case file in *Women Voters of Albuquerque/Bernalilo*

County, Inc., v. Santillanes, 506 F.Supp.2d 598 (D.N.M. 2007), *appeal pending*, No. 07-2067 (10th Cir. 2007), another challenge to voter identification requirements. In *Santillanes*, preliminary motions and congressional testimony reveal that Dwight Adkins had his vote impersonated; his vote was not counted because the impersonator had voted first. The same was true for Rosemary McGee, whose impersonator not only voted earlier, but mis-spelled her name. At least four other such impersonations were detected in that election.

Numerous other voter frauds were also detected in that election which could have resulted in voter impersonation frauds. Some included forgery, but others included changes in existing registration data, a pattern which has been repeated across the country. Again, these could have led to voter impersonation fraud. "In-person voter impersonation fraud" does exist.

One reason why Petitioners contend that such fraud "does not exist" is that they have chosen to define it away by counting only prosecuted cases or by ignoring other forms of voter fraud. As a result, Petitioners do not recognize the value of the challenged voter identification procedures in stopping actual or potential voter impersonations. Indiana had few other options to counter these forms of voter fraud, as evidence, such as Rosemary McGee's case, indicates that signature verification was not effective.

In addition, none of the opening presentations reflect the growing problem of non-citizen voting. Most observers discount the likelihood of non-citizen

voting, erroneously claiming there is no economic value in it. For illegal immigrants, however, voting records have a substantial value as evidence of employment eligibility; as the federal government has increased immigration enforcement, illegal immigrants are increasingly using identity theft crimes for these employment-related reasons.

More importantly, recent political efforts have led to a non-economic incentive for immigrants to participate in election-related activities: to increase political "clout" in hopes of achieving immigration law changes. "Today we march; tomorrow we vote" may be a laudable sentiment about increasing participation by recent citizens, but it also reflects troubling trends in non-citizen-related election frauds.

ARGUMENT

This case turns on perceptions. These perceptions have legal consequences. This Court has recently held that preventing election fraud is a compelling state interest, in part because of the effect on voters' rights. *Purcell v. Gonzalez*, __ U.S. ___, ___, 127 S.Ct. 5, 7 (2006). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Id.*, 127 S.Ct. at 7.

Justice Stevens noted that two significant issues in these voter identification cases will be "the

prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell*, 127 S.Ct. at 8 (Stevens, J., concurring). These would seem to be the standard for review of at least part of this case, Yet, despite hundreds of pages of briefing, Petitioners and their supporters in this case simply assumed that they satisfied Justice Stevens' inquiry, when in fact, they had only defined away and dismissed those two questions.

For example, Petitioners acknowledge that voting fraud should be stopped. "States should and do play a key role in combating election fraud." Brief for Petitioners Indiana Democratic Party, *et al.* ("IDP Br."), at 42. "[C]ombating voting fraud is certainly a compelling governmental interest." Brief for Petitioners William Crawford, *et al.* ("Crawford Br."), at 46.

The decisions below determined that there was sufficient evidence of fraud in the record to support Indiana's legislative response. *See, e.g., Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 793-94 (S.D.In. 2006)(noting both instances of fraud and public perceptions of fraud which contributed to low confidence in elections); *Crawford v. Marion County Election Board*, 472 F.3d 949, 953-54 (7th Cir. 2007)("Some voter impersonation has been found (though not much, for remember that it is difficult to detect)").

Petitioners attack these findings as totally groundless. "But that is pure conjecture, as there is no evidence whatsoever that a single person in Indiana has ever come to the polls on Election Day and tried to vote under the name of a person who

already had voted." IDP Br., at 43. "Here, the problem cited by the State simply does not exist, and the State has offered nothing but speculation and conjecture regarding the harm it allegedly seeks to prevent." IDP Br., at 44 (emphasis added). "[A] problem – in-person impersonation voting fraud – that does not exist and cannot be rationally feared given the general lack of evidence concerning the existence of such fraud." Crawford Br., at 48, 53 (emphasis added).

Note that the disagreement goes beyond just whether the Seventh Circuit's analysis was correct about the situation in Indiana. Petitioners and their supporters assert that in-person voter fraud does not occur ANYWHERE – that it "does not exist."

Respondents, on the other hand, contend that election fraud is significant. "As documented by the district court, voter fraud is a problem of disturbing prevalence around the country." Brief of State Respondents In Opposition to the Petition ("Opp."), at 2, *citing* Pet. App. 40-41.

Any "does not exist" standard is very hard to justify, and the public record indicates that the "does not exist" standard here is unsustainable.

I. "IN-PERSON VOTER IMPERSONATION FRAUD" DOES EXIST.

Petitioners, for example, assert that "there is no evidence whatsoever that a single person in Indiana has ever come to the polls on Election Day and tried to vote under the name of a person who already had voted." IBP Br., at 43. Perhaps that is true about evidence in Indiana, "for remember that it is difficult

to detect." *Crawford*, 472 F.3d at 954. It is not true elsewhere, where voter impersonation is a matter of public record.

The Seventh Circuit said that voter impersonation would be likely detected when "the impersonated person . . . voted already when the impersonator arrived and tried to vote in his name." 472 F.3d at 953. This is not the only way in which voter impersonation could be detected, and likely represents a lesser concern because the real vote itself might not be lost.

In fact, a more troubling version happened – repeatedly – in Albuquerque, New Mexico, in 2004: the impersonated, "real" persons arrived and could not vote after the impersonators had voted earlier. The difference between the two detection methods is that, in Albuquerque, the miscreants were long gone, and the votes cast by the actual voter were not counted. There could be no prosecution, but the harm to the individual voter victims is apparent.

Amicus does not suggest that Albuquerque and New Mexico are particularly prone to election fraud. This is simply the first place *amicus* applied its limited research resources to the available cases.

Both Petitioners cite in passing *Women Voters of Albuquerque/Bernalilo County, Inc., v. Santillanes*, 506 F.Supp.2d 598 (D.N.M. 2007), *appeal pending*, No. 07-2067 (10th Cir. 2007).[2] Crawford Br., at 48;

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[2] *Santillanes* involves the same issue as this case – the constitutionality of a voter identification requirement – and Judge Armijo distinguished the lower court opinions here in

(continued...)

IDP Br., at 49. Petitioners cite *Santillanes* for the proposition that voter impersonation does not exist. *Id.* Yet at least one clear instance of voter impersonation is referenced in *Santillanes*, but the opinion must be supplemented to disclose the impersonation.

Judge Armijo noted in *Santillanes* that "[w]ith respect to the City's narrower interest in preventing people from impersonating another voter at the polls in order to steal their vote, there is no admissible evidence in the record that such voter impersonation fraud has occurred with any frequency in past municipal elections." 506 F.Supp.2d at 637 (emphasis added). She did note that the ordinance in that case was stimulated, at least in part, by reports of such fraud in the 2004 Presidential election, but said that the details of such reports had not been presented to her. *Id.*

One reason for the lack of "evidence in the record" is that Judge Armijo did not permit such evidence to be presented to her. In Footnote 3 of the decision, Judge Armijo notes that she denied a motion to intervene by, *inter alia*, Dwight Adkins. 506 F.Supp.2d at 608 n. 3. In her unpublished memorandum opinion denying intervention, Judge Armijo found that the intervention motion was not filed timely. *American Civil Liberties Union of New*

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[2](...continued)
striking down a city's voter ID requirement. 506 F.Supp.2d at 638.

Mexico v. Santillanes, No. 1:05-cv-01136-MCA-WDS, Doc. 42, slip op., at 11 (D.N.M., July 12, 2006).[3]

Judge Armijo's decision notes only that Dwight Adkins, one of the individuals who moved to intervene, "claims he was deprived of his vote in 2004." *Id.*, at 7. In his Motion to Intervene, however, Mr. Adkins stated that "[i]n the 2004 election, his vote was stolen by someone who voted in his place. Mr. Adkins was 'allowed' to cast a provisional ballot, but he was informed that it was not counted." *Santillanes*, No. 1:05-cv-01136-MCA-WDS, Doc. 33, at 3 (D.N.M. June 13, 2006).

More detail is available in Congressional testimony. A few days after filing his Motion to Intervene, Mr. Adkins's counsel explained to the Committee on House Administration that Mr. Adkins sought to intervene because "[h]e was not allowed to vote when he appeared at his polling place because someone had voted fraudulently in his place. His 'provisional ballot' was cast and denied on the basis, he was told, that he had already voted. Rosemary McGee of Albuquerque suffered the same fate." Comm. on House Administration, *Testimony of Mr. Patrick Rogers*, June 22, 2006, *available at* http://cha.house.gov/index.php?option=com_content &

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[3]Curiously, this motion and Order do not appear in the comprehensive listing of case materials made publicly available by the Moritz School of Law at The Ohio State University. *See, e.g.*, http://moritzlaw.osu.edu/electionlaw/litigation/aclunewmexico.php. They are available, however, through PACER.

task=view&id=75&Itemid=41.

Mrs. Vicki Perea, a former Albuquerque City Council member, also testified: "Rosemary McGee is a Bernalillo County voter who tried to vote on Election Day in 2004, only to find that someone else had signed the voting roster in her place earlier in the day (and spelled her name wrong)." Comm. on House Administration, *Testimony of Mrs. Vicki Perea*, June 22, 2006, *available at* http://cha.house.gov/index.php?option=com_content &task=view&id=102&Itemid=41. Mrs. Perea showed the voting roster to the Committee: "You can see the voting roster on this slide, with Rosemary's actual signature on the bottom, and the signature of the person who voted in her place at the top." *Id.*

Another report indicates that Ms. McGee appeared at the polling place at 3:00PM and found that the impersonator had voted at 7:00AM the same day. Prof. John Lott, "John Fund on the Voting Process in New Mexico," November 10, 2004, available at http://johnrlott.blogspot.com/2004/11/john-fund-on-voting-process-in-new.html. The time is important, because under New Mexico rules, the earlier, impostor's vote was counted, not the later "real" vote. *Id.*

It is also important to note that not only were the signatures visibly different, but the voter's name was mis-spelled. Whatever safeguards were in place to protect against impersonation did not work.

Nor were Mr. Adkins and Ms. McGee the only persons whose votes were physically impersonated by in-person fraud that day; at least four other

Albuquerque voters were impersonated. Vickie Perea, "Candidate for State Treasurer," *Albuquerque Tribune*, October 10, 2006, *available at* http://www.abqtrib.com/news/2006/oct/10/vickie-perea-republican/. These were just the frauds which were detected, and all these detections were after the fact. No prosecutions resulted.

This was not the only type of election fraud which occurred in that election. A closely-related type of fraud, for example, involves changes in a voter's registration form, including forgery or simply changing the address or other information on the file. Thus, an impersonator would not easily be detected, unless and until the impersonated person attempted to vote.

The Albuquerque election had some of these other types of election fraud. *See, e.g.*, Christopher Drew and Eric Lipton, "G.O.P. Anger in Swing State Eased Attorney's Exit," *The New York Times*, March 18, 2007, *available at* http://www.nytimes.com/2007/03/18/washington/18attorneys.html?_r=1&oref=slogin; Perea, *supra*; Lott, *supra*.

Some of these incidents involve outright forgery of ballot materials. Diane Taylor, for example, was convicted of vote fraud for simply forging voter registrations in the name of her three teenage children. KRQE-TV 13, "Rep. Pearce Mingles with Vote Fraud Figure," September 2007, *available at*: http://www.krqe.com/Global/story.asp?S=7113367 Had Taylor received the absentee ballots she requested, she likely would have voted them in an instance of voter impersonation, but it appears that

Mrs. Taylor was caught before voting. Nevertheless, her fraud was classed as voting registration-related because it was caught before she actually cast her sons' absentee ballots.

But other similar child impersonations in Albuquerque could easily have led to undetectable in-person voting fraud similar to that which affected the six voters described above. "The first whiff of something suspicious came when a 15-year-old boy received a voter registration card in the mail. Soon a second one arrived. Then his 13-year-old neighbor got one, too. Neither boy had applied for the cards, and it looked as if their signatures and birthdates had been forged." Drew and Lipton, *supra*. "Local election officials said the cards sent to the two teenage boys were among about 3,000 faulty registrations, with some most likely resulting from mistakes and others raising more questions." *Id.*

This voter (or, in this case, non-voter) impersonation fraud would likely not have been detected by conventional means, since the children would not go to the polling place, and there would be no discrepancy between signatures on the registration and the voting roll. There would have been little or no risk of detection if the same fraudulent voter didn't go to the same polling place too frequently.

"In counting the first 5,000 provisional ballots in Bernalillo County, observers turned up 53 instances of individuals voting more than once." Lott, *supra*. "Double voting appears to fall into two categories: voters who themselves may have voted multiple times, and those whose votes were essentially

stolen." *Id.* This is an "error" rate in provisional ballots of more than one per cent. This error rate is significant in a state of over a million registered voters, but where George W. Bush lost the Presidential contest to Al Gore by 366 votes in 2000. Drew & Lipton, *supra.*

This type of impersonation has occurred recently in other elections. On October 25, 2006, United Press International reported that "[h]undreds of bogus address changes have surfaced near St. Louis and the election board is warning voters to make sure they get a polling-place notification card. If the card does not show up, a voter's address may have been fraudulently changed, the county elections director said." UPI, "Bogus voter-address changes in St. Louis," Oct. 25, 2006, *available* at http://www.upi.com/NewsTrack/Top_News/2006/10/25/bogus_voteraddress_changes_in_st_louis/3201. "Tom Stanislawski registered to vote six years ago. But this summer, someone signed him up again and changed his party affiliation. 'My concern would be I'd walk in November 2nd and be unable to vote,' he said." Hang Right Politics, "The ACORN doesn't fall far from the tree," Oct. 26, 2006, available at: http://hangrightpolitics.com/2006/10/26/the-acorn-doesnt-fall-far-from-the-tree/.

Some might argue that these were mere administrative errors and that impersonations did not "occur[] with any frequency in past municipal elections." *Santillanes*, 506 F.Supp.2d at 637. Nevertheless, the Seventh Circuit's analysis – that such crimes do occur but are hard to detect – seems to be borne out by the public record in at least some

places. Even worse, the flawed belief that voter impersonation "does not exist" may have other consequences, including, for example, insufficient attention to activities which could increase the risk of voter impersonation and other fraudulent activities, as shown in more detail below. Petitioners' "does not exist" standard is flawed.

II. VOTER FRAUD SHOULD NOT BE DEFINED AWAY.

If it seems odd that *amicus* in this brief could rapidly uncover repeated instances of voter impersonation fraud said not to "exist," the answer may lie in the very restrictive definitions used by Petitioners. Petitioners define away voter fraud in two ways: first, by arguing that only "in-person voter impersonation fraud" is affected by the voter identification requirement; and then by only considering those instances in which there was a prosecution. Such an approach would necessarily demonstrate less fraud than a broader analysis.[4]

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[4]Perhaps Petitioners and their supporters recognize the failure of their "does not exist" standard, as several of their claims hedge their bets. In Crawford's Reply Brief at the petition stage, for example, he said: "Nineteen of these 24 convictions [at the federal level between 2000 and 2005] were not because of any impersonation fraud." Reply Brief for Petitioners in No. 07-21, at 2. "Nor was there any credible evidence inside or outside the record that impersonation voter fraud is a serious problem in this country. Brief of *Amicus Curiae* Professor Richard L. Hasen in Support of Petitioners ("Hasen Br."), at 29 (emphasis added). "A New York Times

(continued...)

"Anyone who wants to corrupt election outcomes has far better options than pretending to be someone else at the polls. At best, such a voter-impersonation scheme might net a few illegal votes as the impersonator travels from precinct to precinct." IDP Br., at 43. In other words, Petitioners suggest the only type of fraud which should be considered in this case is identified by the following steps:

> [E]ach impersonator ostensibly would have to: (i) memorize the name and other identifying information of a registered voter; (ii) learn to mimic the voter's signature; (iii) travel to the appropriate polling precinct site for the particular voter; (iv) wait in line at the polling place to cast a ballot in that voter's name; (v) ensure that the registered voter has not already voted at the polls; and (vi) risk detection by a poll worker who may know the registered voter.

Brief for the Lawyer's Committee for Civil Rights Under Law, [*et al.*] as *Amici Curiae* In Support of Petitioners, at 10. To successfully carry out such a fraud, an organization might need "an army of

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[4](...continued)

analysis of efforts of the Justice Department over five years . . . revealed . . . no systematic evidence of the kind of impersonation voter fraud that would support the need for a voter identification law." Id., at 32 (emphasis added).

This type of hedging language is an indication of restrictive analysis. Given the massive resources poured into the opening presentations and in light of the ease with which actual incidents of in-person voter impersonation fraud were uncovered here, a broader analysis could have been presented.

individual impersonators in order to generate a meaningful number of votes." *Id.*

As the Albuquerque example shows, just this sort of activity does occur. At least six voters tried to vote and found that their votes had already been impersonated. The impersonated votes were cast by someone with sufficient knowledge of the rules to know that the votes had to be cast at 7AM, but not sufficient intelligence to spell Ms. McGee's name correctly. There appeared to be no need to "mimic the voter's signature." Beyond that, we know only that election officials were unable to catch the impersonators from the signature mis-match and the mis-spelled name.

We don't know how many additional persons were impersonated. This is the definitional flaw in Petitioners' analysis: "voter impersonation" is most effective and undetectable when coupled with other forms of voter fraud, which Petitioners would not count because that portion of the fraud doesn't include an appearance at the polling place. Yet it is just that type of coordinated fraud which is common in American elections.

A) Voter Fraud Covered By the Challenged Statute Is Broader Than Defined by Petitioners:

In June 2006, Francine Busby lost the special election to replace convicted Cong. Randy "Duke" Cunningham (R-CA) in part because she was seen to have encouraged voting by illegal immigrants. "At the end of the event, a man asked Busby a question in Spanish, which was translated for her: 'I want to help, but I don't have papers.' Busby responded:

'Everybody can help, yeah, absolutely, you can all help. You don't need papers for voting, you don't need to be a registered voter to help.'" John Gizzi, "GOP Moderate Scrapes by After Democrat Panders to Illegals," *Human Events*, June 12, 2006, *available at:* www.humanevents.com/article.php?print+yes&id=15479. Busby argued that she misspoke, but observers noted "those remarks really hurt Busby." *Id.*

Note that it is not just Busby's encouragement which is remarkable. What is equally important, in the context of this case, is that an illegal immigrant wanted "to help." As discussed in more detail below, immigrants are increasingly likely to want to participate, legally or not, in the American political system. It is not just an "army" of miscreants who could affect elections, but increasing numbers of those who, even for benign reasons, "want to help."

Under the *Purcell* standard, even "benign" election fraud can affect legitimacy. As Francine Busby discovered, being seen to have encouraged "help" from illegal immigrants may have an effect on voters, but counting on candidate public mis-steps is not a substitute for enforcing election safeguards.

Nevertheless, such encouragement is not only continuing, it spreads from the highest federal officials. On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake "Voter Identification Cards" to lists which included non-citizens. Julie Foster, "Non-citizens vote with 'Clinton card'?" WorldNet Daily, November 7, 2000, *available at* www.worldnetdaily.com/news/printer-

friendly.asp?ARTICLE_ID=18000. The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id.*

The Clinton letter included a postscript, just below President Clinton's signature, which read: "Here is your personal Voter Identification Card. Sign your name, then detach your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly." *Id.* A copy of the Clinton letter can be found at: http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg.

The "Clinton card" episode did not elicit significant media coverage, perhaps because it was eclipsed by larger news from the 2000 Presidential Election. *See., e.g., Bush v. Gore*, 531 U.S. 98 (2000).

A more contentious example was in the 1996 election in California's 46th Congressional District. Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H. Rpt. 105-416. In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found "significant vote fraud and vote irregularities." *Id.*, at 16. The Committee determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez's margin of victory, so the election challenge was dismissed. *Id.*

An advocacy group was alleged to have encouraged illegal voter registration, and, in this case, voting. *Id.*, at 3. The Orange County, California, District Attorney found that 61% of the

voter registrations by the advocacy group, Hermandad Mexicano Nacional, were illegal. *Id.*, at 337. In addition, the California Secretary of State determined that 303 non-citizens registered by the group had voted in the disputed election. *Id.*, at 19, 337.

The organization admitted having registered illegal immigrants. PBS Online Newshour, "Contested Contest," *Online Focus*, October 22, 1997, *available at*: www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html ("And Lopez of Hemandad Mexicana admits his group registered non-citizens."). The organization contended "Republicans are trying to destroy the organization because of its success in signing up new citizens." *Id.* There was no prosecution.

Unfortunately, these are not isolated concerns about rare registration fraud, but are similar to surprisingly common allegations of fraudulent incidents nationwide. Some allegations of election fraud in Albuquerque, for example, were linked to an advocacy group, the Association of Community Organizations for Reform Now ("ACORN"). *Id.* New Mexico Secretary of State Rebecca Vigil-Giron exempted ACORN-gathered voter registrations from otherwise-mandatory identification requirements. John Fund, "Ballots or Briefs?; In 2004, the Man With the Most Lawyers May Win," *The Wall St. Journal*, Sept. 22, 2004, *available* at http://www.opinionjournal.com/diary/?id=110005654. "Similar allegations have been made in Pennsylvania, Ohio and Colorado, though no charges

have been filed." Fox News.com, "ACORN Accused of Bogus Forms in Mo.," *available* at http://www.foxnews.com/wires/2006Oct25/0,4670, VoterRegistrationQuestions,00.html.

The reports of ACORN-related election fraud are numerous, and continuing. "Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN." Keith Ervin, "Three Plead Guilty in Fake Voter Scheme," *Seattle Times*, October 30, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/200 3982533_acorn30m.html?syndication=rss. "Federal indictments allege the four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation," KMBC-TV, "ACORN Workers Indicted on Alleged Voter Fraud," Kansas City, Missouri, Nov. 1, 2006, *available at:* http://www.kmbc.com/politics/10214492/detail.html,

ACORN, which filed a brief *amicus curiae* in this case, contends that such charges are baseless. Brief of the Association of Community Organizations for Reform Now as *Amicus Curiae* in Support of Petitioners ("ACORN Br."), at 6. ACORN's supporters agree: "One year after the contentious 2004 election, it is clear that politically motivated law firms and organizations leveled unfounded allegations of fraud against ACORN with the goal of tarnishing the community group's reputation and inhibiting its work." Project Vote, "One Year Later:

Results of 2004 Voter Fraud Investigations Give Vote Groups a Clean Bill of Health," December 14, 2005, *available at* http://www.commondreams.org/news2005/1214-09.htm.

Neither the ACORN brief, nor its supporters at Project Vote (which also joined in a brief *amici curiae* in this case), addressed the guilty pleas in Washington State. Ervin, *supra*. Nor did the ACORN or Project Vote briefs discuss the New Mexico problems described above. And the ACORN and Project Vote briefs did not discuss the enabling effect of voter registration fraud on voter impersonation. Neither did any other opening briefs. Yet all three of these problems both exist and were well-publicized.

Whether or not ACORN or other groups were actually involved in voter registration fraud, the existence of such widespread and consistent allegations, admissions, and criminal pleas over a long period of time indicate that fears of voter fraud are not groundless, and that public perceptions must be considered. *Purcell*, 127 S.Ct. at 8. As Mr. Adkins' experience shows, some voters have been deprived of their votes by someone who voted in their names.

Widespread voter registration fraud is not, as the Petitioners suggest, utterly divorced from voter impersonation fraud. Indeed, the alleged voter registration schemes could lead to massive voter impersonation fraud, especially if coupled with individual identification fraud.

Unfortunately, individual identification fraud is also rampant and growing. "The prevalence of identity theft is growing." General Accounting Office,

"Identity Fraud: Prevalence and Links to Alien Illegal Activities." GAO-02-830T, June 25, 2002, at 1.

The ACORN and other reports of voter fraud receive widespread coverage, and would tend to undercut voter confidence. *Purcell*, 127 U.S. at 7. It is not unreasonable for Indiana to want to avoid both the actual voter fraud caused by impersonation and the loss of citizen confidence which accompanies the media coverage of such fraud.

B) The Lack of Prosecution Does Not Mean the Lack of Fraud:

Besides defining away the problem of voter impersonation, the petitioners and their supporting commentators are using flawed and limited analyses of voting fraud. Their analyses discounting voting fraud are largely based on prosecutions brought and won. *See., e.g.*, Hasen Br., at 32 ("only 86 successful prosecutions" over five years); IDP Br., at 43 ("no one in Indiana . . . been prosecuted for impersonating a registered voter")(citation omitted); *id.*, at 48 ("Not a single one of the convictions detailed in the DOJ report involved in-person voter-impersonation fraud.") (emphasis added).

These analyses are based principally on three sources: a report prepared by Lorraine C. Minnite for Project Vote, the organization supporting ACORN quoted above, Lorraine C. Minnite, Ph.D., *The Politics of Voter Fraud*, PROJECT VOTE, at 3 (2007) ("Minnite"), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf; a brief *amicus curiae* prepared by the Brennan Center for

Justice at NYU Law School for the lower court,[5] *available at:* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BCJBr_000.pdf; and, a *New York Times* article. Eric Lipton and Ian Urbina, "In 5-year Effort, Scant Evidence of Voter Fraud," *The New York Times*, April 12, 2007, available at http://www.nytimes.com/2007/04/12/washington/12fraud.html?_r=1&oref=slogin.

None of these three sources discuss the New Mexico or other voting frauds discussed above. It is unknown what other omissions endanger their analyses, but these three sources also discount allegations of voter fraud either by redefining it or by limiting them to law enforcement reports.

For example, Minnite scoffs at reports that law enforcement agencies fail to undertake prosecutions. "It is difficult to conceive of whole categories of criminal behavior that go almost completely undetected or ignored by law enforcement officials." *Id,* at 11. Yet, that is exactly what happens in some categories of the law, such as immigration law enforcement, as was amply documented in the *amici curiae* brief filed by the AULDF, CAU, and other

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[5]These first two sources have been supplemented by a brief *amici curiae* here, on behalf of Brennan Center, Minnite, Project Vote and others. Brief of *Amici Curiae* the Brennan Center for Justice; [*et al.*] in Support of Petitioners. The two Brennan Center briefs are similar in content, and the new brief is discussed jointly with the older brief, as neither contains a discussion of either the New Mexico situation or the methodological flaws discussed herein.

organizations in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations).

Given the California non-citizen voting identified in 1996, H. Rpt. 105-416, at 337, the lack of immigration law enforcement is significant, since, in the context of prosecutions for vote fraud, the same propensity to ignore crimes seems to recur. "Another [U.S. Attorney] office reported that they declined to prosecute a number of investigations (number not tracked) that involved aliens who registered to vote. Rather than prosecute, they allowed administrative procedures regarding deportation to occur." GAO-05-478, at 60.

Similarly, the House Committee on House Oversight reported in 1998 that the Immigration and Naturalization Service was unwilling to assist in investigating fraud by non-citizens in the 1996 elections. H. Rpt. 105-416, at 88, and n. 79.

In California, the House Oversight Committee reported, the Orange County District Attorney failed to obtain indictments, even though his investigation demonstrated huge amounts of vote fraud, including that 61% of an advocacy group's voter registrations were "illegal." *Id.*, at 337. The Secretary of State determined that 442 non-citizens voted in the disputed 1996 election, but no prosecutions appeared. *Id.*, at 338. A grand jury refused to issue indictments for the "several individuals who coordinated the Hermandad Mexicano Nacional voter registration effort. At least one witness who had worked for Hermandad fled to Mexico early in 1997, making the investigation more difficult." *Id.*,

at 337. All this even though the head of Hermandad Mexicano Nacional admitted registering non-citizens. PBS Online Newshour, *supra*.

Nor do any prosecutions appear to have been undertaken in New Mexico, despite the voter impersonation appearing in the public record. In fact, the lack of prosecutions appears to have become a political controversy in other areas. Drew and Lipton, *supra* (detailing then-U.S. Attorney David Iglesias's discussions with the Department of Justice over whether to prosecute various alleged election frauds in New Mexico).

The central reason why prosecutors do not address these forms of election fraud is not hidden. The legal test is whether there was an intent to influence the election, and such an intent is almost impossible to prove. "BILL JONES, CALIFORNIA'S SECRETARY OF STATE: "We are seeking to deal with . . . whether or not there was an intent to defraud in the case of the individuals there who either voted or participated in that process or not because you always have to prove intent." PBS Online Newshour, *supra*..

Curiously, former U.S. Attorney David Iglesias's description of why he could not charge one ACORN worker with election fraud is illustrative of a new and growing trend: she didn't do it to influence the election – she did it "for the money." Drew and Lipton, *supra*. Absent a provable intent to influence an election, some admissions are not recorded as election fraud.

As shown below, the same is increasingly true of illegal immigrants' theft of legitimate identities.

Coupled with the traditional reluctance to enforce election laws against immigrants shown *infra*, this requirement will likely mean no prosecutions of aliens involved in election fraud at a time when immigration to the United States is at an all-time high.

These cases do not appear in the Petitioners' or their supporters' briefs. Nor do they appear in the three sources substantiating the Petitioners' "does not exist" argument.

Thus, in this case, where the information is both hidden and unlikely to be presented in an indictment, the lack of prosecutions cannot be equated with a lack of existence. The "does not exist" argument underlying Petitioners' analyses is likely over-stated.

III. INDIANA HAS NO OTHER REALISTIC OPTION TO PREVENT THESE FRAUDS

The in-person election fraud reported above could be minimized by a voter identification requirement. Ms. McGee's impostor, who didn't even know how to spell her name, could have been stopped if required to show identification. The same with Mr. Adkins' impostor and the other four impostors.

The third major flaw in Petitioners' position, however, is to think that this is the only sort of fraud which could be stopped or prevented by an identification requirement. As shown by the voter registration fraud examples above, a significant portion of that type of fraud may evade current application safeguards. Identification at the polls would keep, for example, persons who don't know

how to spell Ms. McGee's name from voting in her name, even if they diverted her voting registration to the wrong address, as was alleged in St. Louis.

The identification requirement adds another layer of difficulty to voter registration frauds, as the person who diverts the voter registration information, for example, would also have to generate a new, compliant identification card. A "Clinton card" would not be sufficient.

Illegal immigrants who "want to help," as in the Busby campaign, would not get the employment benefit of a voting receipt. The alien would have more difficulty in obtaining a higher-quality identification document to steal a voter's identity for employment purposes (*see, infra*).

Petitioners suggest that signature verification would be a viable alternative. "The plain fact is that the system of signature verification used for many decades, backed up by state and federal criminal penalties punishing fraudulent voting, worked extraordinarily well to prevent in-person voter fraud." IDP Br., at 42.

Unfortunately, as shown above, signature verification was ineffective in Albuquerque. As demonstrated to the Committee on House Administration, Ms. McGee's impostor simply signed, voted and ran. "You can see the voting roster on this slide, with Rosemary's actual signature on the bottom, and the signature of the person who voted in her place at the top." *Testimony of Mrs. Vicki Perea, supra.*

And signature verification would not be effective when voter impersonation is coupled with voter

registration fraud. "Tom Stanislawski registered to vote six years ago. But this summer, someone signed him up again and changed his party affiliation." Hang Right Politics, *supra*. This type of fraud would be undetectable without voter identification, and, if the reports of thousands of erroneous voter registrations are credible, an organized scheme combining registration and in-person fraud could lead to sufficient votes to tip a close election.

In a case fraught with partisan overtones, it is important to look at what observers were saying before the issue became polarized. The Democratic members of the Committee on House Administration issued a minority report on the disputed 1996 election which took issue with much of the majority's findings, but they also said:

> We use the word *may* quite deliberately here because short of an actual face-to-face interview with the suspect voter, nothing can be concluded about a suspect's citizenship status and right to vote in the State of California from all the materials the Majority demanded from Orange County and INS. Even *probable signature matches* between Orange County registration ballots and INS records, which the Minority used to reach its estimate, while perhaps the most reliable indication of a match, do not constitute proof.

H. Rpt. 105-416, at 1043.

Given the difference in definitions and perspectives, it is clear that Petitioners and their supporters do not agree that voting fraud is a significant problem. That difference, however, is not

an automatic bar to the Respondents' legislation and enforcement.

Given the broader scope and nature of the voting fraud problem addressed by the Indiana statute, it can't be said that there is no problem or that it is just a minor problem. The trends, particularly given immigrants' increasing motivations to vote, properly or not, are not encouraging.

IV. THIS PROBLEM WILL LIKELY GET WORSE, AS VOTING FRAUD BY NON-CITIZENS IS A SPECIAL, AND GROWING PROBLEM.

Cases and reports over many years indicate that non-citizens have voted illegally across the country. In 1954, for example, the Senate Committee on Rules and Administration noted that illegal immigrants had voted in the 1952 New Mexico Senate election. Committee on Rules and Administration, Report of the Subcommittee on Privileges and Elections, 83rd Congress, 2nd Session, "General Findings and Conclusions," at 1, U.S.G.P.O. Wash. 1954.

These problems continue. Petitioners themselves disclose a report noting 19 convictions between 2002 and 2005 "because the voters were not eligible to vote, either because they were convicted felons or non-citizens." Reply Brief for Petitioners Crawford, *et al.*, at 2, *citing* Minnite, *supra*. In *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir., 2007), the Ninth Circuit noted that the record in that case "indicates that, between 1996 and the present, as many as 232 non-citizens tried to register to vote and that the

State prosecuted ten of those 232 alleged non-citizens." 485 F.3d at 1048. In *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir, 2007), the Eleventh Circuit upheld the conviction of a Jamaican citizen who voted in the 2000 Presidential election. In *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992), the Court of Appeals of Texas, El Paso, reported that "Simmons lost one vote because one person voted for him who was not a citizen of the United States."

In 2005, the Government Accountability Office reported that, from January 2001 to May 2004, "In California, the only state with an investigative unit dedicated to voter fraud issues. . . the California investigative unit opened for investigation 29 allegations of non-citizens either registering or voting." Govt. Accountability Off., "Elections: Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists," GAO-05-478, June 10, 2005, at 59, App. III. During the same period, GAO reported that "[a]t the federal level, DOJ attorneys initiated at least 61 election fraud investigations or matters; of those cases, 15 involved voter registration or ineligible voters." *Id.*

Earlier, the Committee on House Oversight calculated 748 invalid votes in a disputed 1996 contest in the 46th Congressional District of California. H. Rpt. 105-416, at 15 ("In total, the Task Force found clear and convincing evidence that 748 invalid votes were cast in this election."). Because that number was less than the margin of victory, the Committee dismissed the election challenge. *Id.*

It is important to note that the Committee only counted the illegal votes of "documented" immigrants, not illegal immigrants like the one who wanted to "help" Francine Busby in San Diego last year. The Committee noted "a serious question and a troubling hypothesis: if there is a significant number of 'documented aliens', aliens in INS records, on the Orange County voter registration rolls, how many illegal or undocumented aliens may be registered to vote in Orange County? The Task Force can make no conclusion based on the materials before it." *Id.* In other words, had enough illegal immigrants, whose votes were undetectable by the House Committee, also voted, would that have changed the Committee's conclusions? It could not say, but is troubled by the possibility.

Some observers suggest that voting fraud by non-citizens does not occur because there is no economic incentive for them to vote and there are substantial penalties if they are discovered. "Critics say independent research shows that illegal immigrants do not vote. [Luis] Figueroa said undocumented immigrants have no motivation to vote illegally because voting would jeopardize their chances of acquiring citizenship." Juan Castillo, "Vote ID debate replete with drama, but is voter fraud an urgent problem?" *Austin American-Statesman*, May 23, 2007, *available* at http://www.statesman.com/search/content/region/legislature/stories/05/23/23voterid.html. *Compare*, *Sure-Tan , Inc., v. Nat'l Labor Relations Board*, 467 U.S. 883, 887 (1984)(six of seven voters in union election were illegal immigrants).

This assumption does not appear to be well-grounded in modern immigration and employment law. *See, e.g.*, 8 C.F.R. § 274a.2 (making a voter registration card an acceptable document for employment verification). "Nevertheless, the [Federal Election Commission] officials noted that non-citizens may be encouraged to register to vote because the I-9 form used to provide proof of employment eligibility and its implementing regulations includes, among other documents, the voter registration card as an acceptable document for employment identity purposes." GAO-05-478, *supra*, at 17.

Modern illegal immigrants are often familiar with impersonation and similar fraudulent tactics. Ironically, so-called "undocumented" aliens tend to be involved in substantial amounts of document and identity theft. "The prevalence of identity theft appears to be growing." Government Accountability Office, "Identity Fraud: Prevalence and Links to Alien Illegal Activities." GAO-02-830T, June 25, 2002, at 1, 3. "Though most people think of identity theft as a financial crime, one of the most common forms involves illegal immigrants using fraudulent Social Security numbers to conduct their daily lives." John Leland, "Some ID Theft Is Not for Profit, but to Get a Job," *The New York Times*, September 4, 2006, A1, *available at* http://www.nytimes.com/2006/09/04/us/04theft.html.

Federal law enforcement officials have recently focused new resources on attacking identity theft by illegal immigrants. Spencer S. Hsu and Krissah Williams, "Illegal Workers Arrested in 6-State ID

Theft Sweep," *The Washington Post*, December 13, 2006, A01 ("U.S. authorities cast the 11-month investigation as an attack on identity theft, not on typical immigration violations.").

There is little discussion, however, of a new and growing non-economic incentive for non-citizen voting fraud: wielding political power. As Congress discussed immigration legislation over recent years, millions of aliens demonstrated nationwide in support of amnesty for illegal immigrants. "Millions of people marched in the streets on behalf of immigrants in what seemed to be an almost spontaneous, yet peaceful uprising for workers." Gabriela D. Lemus, "The Latino Vote," *Point of View*, AFL-CIO, *available at* http://www.aflcio.org/mediacenter/speakout/gabriela_d_lemus.cfm. A recurring theme of these demonstrations was "Today we march, tomorrow we vote." *Id.*

Such exhortations may reflect laudable sentiment toward encouraging legitimate votes by those who support immigrants rights. Nevertheless, as shown above, in the recent past, many non-citizens have been encouraged to vote illegally.

These two trends – voter fraud generally and voter fraud by non-citizens – will likely move together. As recent public street demonstrations and the Busby campaign volunteer indicate, there is a growing movement to motivate immigrants to vote. There will similarly be those who want to abuse the voting registration and voting procedures, as did Hermandad Mexicano Nacional, for money or power.

CONCLUSION

Amicus therefore respectfully urges the Court to affirm the decision below.

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December 10, 2007

AMICUS CURIAE BRIEF

No. 07-021

In The

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, AND ASIAN AMERICAN INSTITUTE, *ET AL.*, IN SUPPORT OF PETITIONERS

[DISENFRANCHISEMENT OF ASIAN AMERICAN VOTERS]

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Asian Pacific Islander Legal Outreach
Chinese for Affirmative Action
Filipinos for Affirmative Action
Hmong National Development, Inc.
Japanese American Citizens League
Korean American Coalition
Leadership Education for Asian Pacifics
Na Loio Immigrant Rights and Public Interest Legal Center
National Alliance of Vietnamese American Service Agencies
National Asian Pacific American Bar Association
National Asian Pacific American Women's Forum
National Coalition for Asian Pacific American Community Development
National Korean American Service & Education Consortium
Organization of Chinese Americans
Sikh American Legal Defense and Education Fund
Southeast Asia Resource Action Center

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Asian American Justice Center ("AAJC"), a 501(c)(3) nonprofit, nonpartisan organization, was incorporated in 1991 and opened its Washington, D.C., office in 1993. AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC focuses its work to promote civic engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level. A nationally recognized voice on behalf of Asian Americans, AAJC focuses its expertise on affirmative action, anti-Asian violence prevention/race relations, census, immigrant rights, language access, and voting rights. We have maintained a strong interest in the voting rights of Asian Americans and strive to protect Asian Americans' access to the polls. Such long-standing interest has resulted in our participation in a number of amicus briefs before the courts.

Amici include Japanese, Chinese, Filipino, Korean, Hmong, South Asian, Pacific Islander, Cambodian, Laotian, and Vietnamese American public-interest groups. *Amici* also include some of

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

the largest and oldest Asian American organizations in this country that are involved in challenging racial discrimination, safeguarding civil rights, and advocating for voting rights. The statements of interest for these additional *Amici* are included in Appendix A.

SUMMARY OF ARGUMENT

In this case, the Court is asked to balance the impact on the right to vote of an Indiana statute that requires photographic identification against the state's proffered justification for that law – the prevention of voter fraud. As other briefs have shown, the state's justification is based solely on undocumented speculation about voter fraud. This brief addresses the impact of Indiana's voter identification law on Asian Americans (and other minorities) and concludes that, given the barriers the law erects to legitimate Asian American voter participation, the law is unconstitutional.

The Indiana statute sets a new requirement for voting in Indiana: only those who possess a federally issued identification or an identification card issued by the state of Indiana, such as a driver's license, can cast a ballot. This restriction on the right to vote creates an unreasonable barrier to voting by naturalized citizens of this country, disproportionately depriving Asian Americans of that fundamental right. Combined with the unique challenges faced by Asian Americans at the polls due to perceptions that they are "outsiders" or "foreigners" rather than "real Americans," the restrictions imposed by the Indiana law are

particularly invidious when considered against the utter lack of evidence that the purported reason for the Indiana statute – the need to prevent voter fraud – even exists. In light of this nation's history of voting discrimination, this deprivation of a fundamental right is constitutionally suspect.

The history of voting in this country is replete with examples of states enacting seemingly neutral voting requirements that have the effect of preventing racial minorities from voting. Indiana's example is particularly dangerous, as it raises barriers to voting for minority groups such as Asian Americans under the guise of addressing a problem that may not even exist.

ARGUMENT

I. INDIANA'S LAW DISPROPORTIONATELY DEPRIVES ASIAN AMERICANS OF THE RIGHT TO VOTE BY REQUIRING IDENTIFICATION THAT ASIAN AMERICANS ARE LESS LIKELY TO POSSESS

Indiana law requires that individuals wishing to exercise the fundamental right to vote show a government-issued photo identification. Ind. Code §§ 3-11-8-25.1 (requiring the presentation of identification to vote) *and* 3-5-2-40.5 (2006) (setting forth the criteria for appropriate identification). This law effectively sets a new requirement for voting in Indiana: only those who possess a federally issued identification or an identification card issued by Indiana such as a driver's license can cast a

ballot. The Indiana law turns U.S. citizens without these forms of identification away from the voting booth.

Immigrant and minority voters are "consistently less likely to have" the required identification. Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters* 1 (2007) (presented at 2007 American Political Science Association Annual Conference) (on file with *Amici*). Racial and ethnic minorities, including Asian Americans, do not have the same access to identification as whites. *Id.* at 16-17.

The only generally available federal identification card for most citizens is the passport. But obtaining a passport requires both time and some expense, with delays up to three months. Michelle Higgns, *New Passport Rules May Mean Delays*, N.Y. Times, Oct. 1, 2006, http://www.nytimes.com/2006/10/01/travel/01prac.html?_r=2&ref=travel&oref=slogin&oref=slogin. The fee to obtain a passport is currently $97 for those of voting age. U.S. Dep't of State, Passport Fees, http://travel.state.gov/passport/get/fees/fees_837.html. Nationwide, just over one-quarter of all Americans have U.S. passports. Higgins, *supra*. *See also* U.S. Sen. Carl Levin, Important Information Regarding Temporary Travel Flexibility for U.S. Citizens Traveling to Canada, Mexico, Bermuda or the Caribbean by Air, http://www.senate.gov/~levin/newsroom/release.cfm?id=275776.

Absent a passport, the statute in question requires voters to present an Indiana state-issued identification card. Asian Americans and foreign-born individuals, however, tend to be less likely to have driver's licenses,[2] and the requirements for obtaining an Indiana identification card further deter Asian American would-be voters. In Indiana, in order to receive a driver's license or identification card, an applicant must provide either (a) one primary document, one secondary document, one document proving residency, and proof of a valid social security number or (b) two primary documents, one document proving residency, and proof of a valid social security number. 140 Ind. Admin. Code 7-4-2 (b) (2006). Indiana law requires no fewer than two and as many as four documents to obtain the requisite identification to vote.

Such a requirement makes it more difficult for minority voters to obtain a driver's license. *See* Barreto, *et al.*, *supra*, at 16 (finding that in California, New Mexico and Washington, Asian American and African American voters are twenty percent less likely to have two forms of six common forms of identification (driver's license, birth certificate, bank statement, passport, utility bill, property tax statement), and that Latino voters are thirteen percent less likely to have two forms of identification).

[2] *See* Barreto, *et al.*, *supra*, at 26, tbl. 3 (finding that Asian American and foreign-born voters in California, New Mexico and Washington State are eight percent less likely than their white counterparts to have a valid driver's license).

In Indiana, it is not hard to see why. Under the statute in question, one primary form of identification required to obtain a driver's license is a U.S.-issued birth certificate. 140 Ind. Admin. Code 7-4-3 (b)(1) (2006). Asian Americans in Indiana, like Asian Americans nationally, are still primarily foreign-born. A full sixty percent of voting age Asian American U.S. citizens living in Indiana are foreign-born. U.S. Census Bureau, Census 2000: Summary File 4, PCT 44, http://www.census.gov/Press-Release/www/2003/SF4.html. Another primary form of identification is a Certificate of Naturalization. Obtaining a replacement Certificate of Naturalization requires $380 and can take up to a year. *See* U.S. Dep't of Homeland Sec., Instructions for Application of for Replacement Naturalization /Citizenship Document 2, http://www.uscis.gov /files/form/N-565instr.pdf (documenting the filing fee); U.S. Immigration Assistance Ctr., Naturalization Frequently Asked Questions, https://www.immigration-bureau.org/c_faq.htm#21 (noting year-long wait for replacement papers).

This additional prerequisite to Asian Americans exercising the right to vote operates in much the same way that now shameful relics of our nation's history such as poll taxes and literacy tests did: it places unjustifiable obstacles in the way of one group of voters to access the ballot box. The Indiana statute should be declared unconstitutional in the same way those laws were.

A simple glance at the list of secondary documents for obtaining an Indiana driver's license further demonstrates the ways in which Asian

Americans are disproportionately impacted by the Indiana statute. Nearly one in ten Asian American citizens who were 35 years of age or older in 2000 immigrated to the United States between 1990 and 2000 and could not have received a high school education in the United States. U.S. Census Bureau, Census 2000 Advanced Query (on file with *Amici*). Thus, secondary documents acceptable to prove identification, including certified academic transcripts from U.S. schools, a school report card dated within twelve months of the application, and a yearbook photo within three years of application, simply do not exist for many Asian American voters.

Asian Americans also disproportionately lack common documents, such as bills, that may be used to show the proof of residency that is a prerequisite to obtaining an Indiana state-issued identification. In the case of family and multi-generational households, a living pattern Asian Americans and Pacific Islanders are more likely to engage in, bills may be solely in the name of the male head of household, leaving the other adults without proof of their residency in that house. Barreto, *et al.*, *supra*, at 17. *See also Hearing on S.440, S.464, H.638, H.649, H.650, H.652, H.680, H.692, H.695, and H.709 Relating to Voter Identifications Requirements Before Joint Committee on Election Laws*, 185 Gen. Ct., Sess. 1 (Mass. 2007) (statement of Carole Pelchat, Vice Pres., League of Women Voters of Mass.), http://www.lwvma.org/Oral%20Testimony%20for%20JEL%20Hearing%206-13-07%20ID%20Requirements%20FINAlletterheadL.pdf ("Many Americans live in domiciles as roommates, spouses, or relatives, or live on a college campus, where their

name is not on the lease or on utility bills."). Asian American voters are eighteen percent less likely to be able to produce a utility bill and eleven percent less likely to be able to produce a property tax bill. Barreto, *et al.*, *supra*, at 26, tbl. 3. In Indiana, fifty-four percent of voting age Asians living in households are not householders (for Census purposes, the householder is the person identified as the head of the household). By contrast, forty-six percent of the total population living in households are not householders. U.S. Census Bureau, Census 2000 Advanced Query (on file with *Amici*).

Each of these examples of the ways that Asian Americans disproportionately lack the forms of identification required under the Indiana statute in question demonstrate the law's restrictive effect on the fundamental right to vote. The statutory requirements for obtaining government-issued identification clearly disadvantage Asian Americans (and other immigrants and non-native Indiana residents). The Court has declared that restrictions on the right to vote must be "closely scrutinized and carefully confined." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). Indiana's statute, which requires that voters show forms of identification that native Indiana voters have as a matter of course, but that naturalized citizen voters either simply do not have or need to jump through numerous hoops to acquire, sometimes at great expense and often with long delays, falls far short of this standard.

Participation in the democratic process should unite all Americans. The Indiana statute divides

voters between insiders and outsiders, between native Indiana residents and U.S citizens from other states and nations.

II. THE INDIANA STATUTE IS AN INVITATION TO DISCRIMINATE AGAINST ASIAN AMERICANS AT THE VOTING BOOTH

Asian Americans face unique challenges at the polls, as they have for decades, because they frequently are considered "outsiders" or "foreigners" rather than "real Americans" with the right to vote.[3] The Indiana statute all but legalizes such exclusion, not only by requiring identification that Asian Americans are less likely to have but by legislating an additional proof requirement of eligibility. This is particularly invidious when considered against the utter lack of evidence that the purported reason for the Indiana statute – the need to prevent voter fraud – even exists.[4]

This country has often legislated Asian Americans' "outsider" status through exclusionary immigration and citizenship laws. *See, e.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61;

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[3] *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them).

[4] *See, e.g.*, Barreto, *et al.*, *supra*, at 7 ("A recent *Project Vote* report however provides a comprehensive review of extant data and concludes that all available evidence suggests voters rarely commit voter fraud in the United States.").

Geary Act, ch. 60, § 1, 27 Stat. 25 (1892); Immigration Act of 1917, ch. 29, 39 Stat. 874 (establishing an "Asiatic barred zone"). Not until 1952 were these exclusionary laws lifted and Asian Americans allowed to immigrate and to naturalize in larger numbers, thus gaining the right to vote. But the elimination of de jure discrimination against Asian Americans did not mean that prejudice against Asian Americans was similarly eliminated,[5] and the legal right to vote has not always translated into an equal right to access the ballot box. This is evident in discriminatory treatment of Asian Americans by poll workers. To provide just two of numerous examples from California to Florida:

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[5] In 2001, a comprehensive survey revealed that seventy-one percent of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56, http://www.committee100.org/publications/survey/C100survey.pdf (2001). Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. C. Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); S. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72, 74-75 (2001); Terry Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); T. Devos & M. Banaji, *American = White?* 88 J. Personality & Soc. Psych. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

- In the 2000 general election in San Francisco County, a poll worker, frustrated with a Chinese American constituent's lack of English proficiency, yelled at the voter and took his ballot away.[6]

- In West Palm Beach, Florida, an election worker told a voter that the city was not handling Asian American voters at that polling place.[7]

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[6] *Informational Hearing on the Federal Voting Rights Act Before the S. Elections, Reapportionment and Constitutional Amendments Committee*, 2005 Leg., Sess. 3 (Cal. 2005) (statement of Karin Wang, Vice President, Programs, Asian Pacific American Legal Center), http://www.sen.ca.gov/ftp/SEN/COMMITTEE/STANDING/EL/_home/HearingsTestimony/KarinWang12_5_2005.pdf.

[7] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing on S. 2703 Before Subcomm. on the Constitution, Civil Rights and Prop. Rights of the Comm. on the Judiciary*, 109th Cong. 8 (2006) (statement of Karen K. Narasaki, Pres. and Exec. Dir. Asian Am. Justice Ctr.) [hereinafter *Narasaki Statement*] (detailing poll worker abuse). Likewise, poll workers have been documented as maintaining separate lines for English-speaking voters and those with limited English proficiency, providing incorrectly translated materials, denying citizens the right to enter a polling place with an assistant of their choice, labeling South Asian American voters as "terrorists," and intimidating Asian American voters. Asian Am. Legal Def. & Educ. Fund, *Asian Americans and the Voting Rights Act: The Case For Reauthorization* 19-22 (2006) [hereinafter AALDEF 2006], http://www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf.

The Indiana law, at best, provides cover for such selective mistreatment of Asian Americans at the polls and, at worst, facilitates and encourages it. The National Commission on Election Reform has found that identification laws such as Indiana's lend themselves to selective enforcement at the polling places, where poll workers may decline to enforce the law with individuals they know and use the requirement to confront and intimidate "strangers." John Mark Hansen, Task Force on the Federal Election System, *Voter Identification*, in *To Assure Pride and Confidence in the Electoral Process* ch. VI, at 4 (2001), http://www.tcf.org/publications/electionreform/full_tf_report.pdf. Asian Americans, both historically and today, because of skin color, language proficiency, names or other bases for differentiation from "real American," too often bear the brunt of such characterizations.[8]

Indeed, in states where poll workers already have the discretion to ask for photo identification, studies have shown they are more likely to ask for the identification from minority voters. In the 2004 election, for example, minorities were required to

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[8] The prejudicial belief that Asian Americans are not "Americans" and thus not entitled to vote is disseminated by the media as well. In 2005, for example, when discussing a Korean American mayoral candidate, a New Jersey radio host denigrated Asian Americans during an on-air radio show by using racial slurs, speaking in mock Asian gibberish, and making comments such as "I don't care if the Chinese population in Edison has quadrupled in the last year. Chinese should never dictate the outcome of an election. Americans should . . . ." *Narasaki Statement*, *supra*, at 9

show their identification seven percent more often than white voters. In New York, sixty-nine percent of Asian American voters who were asked to show identification were not legally required to do so. AALDEF 2006, *supra*, at 19.

Even in a state like Indiana, where all voters must show identification in order to cast an official ballot, poll workers are still charged with ensuring that the photo identification is adequate, that the picture matches the person presenting the identification, and that the name "conforms" to the voter rolls, and are required to challenge voters whose identification, in the poll worker's discretion, is inadequate. Ind. Code §§ 3-5-2-40.5 (1) (requiring "the name [to] conform[] to the name in the individual's voter registration record") *and* 3-11-8-25.1 (c)(2) (allowing "a member of the precinct election board [to] determine[] that the proof of identification provided by the voter does not qualify as proof of identification under IC 3-5-2-40.5"). This leaves several ways in which poll workers can discriminate against minorities, intentionally or unintentionally. Even benign influences, such as improper training of poll workers, lead to the rejection of eligible Asian American voters from the polls. *See Hearing on Non-Citizen Voting Before Comm. on House Admin.*, 109th Cong. (2006) (statement of Christine Chen, Exec. Dir., Asian Pacific Islander Am. Vote), http://cha.house.gov/index.php?option=com_content&task=view&id=81&Itemid=11 ("Deciding whether a voter matches or does not match the photo in an ID card is a very subjective process.").

The requirement that names on identification conform to names on the voting rolls can also deter eligible Asian American voters because of confusion when Asian names are Anglicized. For example, the order of first and last name is easily reversed. *Id.* Converting Asian names into written English can also result in discrepancies. *Id.* Thus, a poll worker who is unfamiliar with Asian American names – or who is motivated by an improper purpose – can deny Asian Americans the right to vote by exercising his or her discretion to determine that the name on an Asian American voter's identification card does not "conform" to the name listed on the rolls.[9]

The history of voting in this country is replete with examples of states enacting seemingly neutral voting requirements that have the effect of preventing racial minorities from voting.[10] The

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[9] *Cf.* People For the American Way Foundation, *The New Face of Jim Crow: Voter Suppression in America* 19-20 (2006), http://media.pfaw.org/PDF/Reports/TheNewFaceOfJimCrow.pdf. (noting that, in California in 2006, a requirement for matching a new voter name to existing state databases (*e.g.*, "Michael R. Neuman" would not match a "Mike R. Neuman" at the same address) resulted in numerous voter registrations being rejected – over 26,000 in Los Angeles County alone).

[10] For example, state laws requiring poll taxes and literacy tests that appeared neutral in reality disproportionately disenfranchised minority voters because poll workers selectively applied them. The Court has struck down such laws repeatedly. *See, e.g.*, *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 53 (1959) ("[A] literacy test may be unconstitutional on its face . . . [as t]he legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy.") (citing *Davis v. Schnell*, 81 F. Supp. 872

(Continued . . .)

Indiana statute extends that sad history and should be treated in the same way that prior discriminatory voting laws have been: as unconstitutional and threatening to our most basic democratic principles.[11]

CONCLUSION

Under any standard of review, this Court should find the Indiana voter identification law unconstitutional under the Fourteenth Amendment and should reverse the Seventh Circuit's decisions below.

(S.D. Ala. 1949); *Louisiana v. United States*, 380 U.S. 145, 150 (1965) (affirming the District Court's finding that Louisiana's literacy test was discriminatory because it gave "virtually unlimited discretion" to the "registrars of voters, and because in the 21 parishes where the interpretation test was applied that discretion had been exercised to keep Negroes from voting because of their race").

[11] As one commentator has noted, the balancing of the likelihood of voter fraud against the potential for disenfranchisement of legitimate voters must be assessed carefully:

> While a small amount of voter fraud hypothetically could determine a close election, the exclusion of twenty million Americans who lack photo identification could erroneously skew a larger number of elections . . . . More important, erroneous exclusion of legitimate participants carries greater costs in the voting context because assessing the will of the people as a whole is an essential objective of democracy.

Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 634, 636 (2006).

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APPENDIX

List of *Amici Curiae*

Asian & Pacific Islander American Health Forum

The Asian & Pacific Islander American Health Forum ("APIAHF") is a national advocacy organization dedicated to promoting policy, program, and research efforts to improve the health and well-being of Asian American, Native Hawaiian, and other Pacific Islander ("AA,NHOPI") communities. Founded in 1986, APIAHF approaches activities with the philosophy of coalition-building and developing capacity within local AA,NHOPI communities. We advocate on health issues of significance to AA,NHOPI communities, conduct community-based technical assistance and training, provide health and U.S. Census data analysis and information dissemination, and convene regional and national conferences on AA,NHOPI health. Our health and well-being advocacy extends to an interest in increased participation in the electoral process within the AA,NHOPI communities and results in our participation in this amicus brief.

Asian & Pacific Islander American Vote

Asian and Pacific Islander American Vote ("APIAVote") is a national nonpartisan, nonprofit organization that encourages and promotes civic participation of Asian Pacific Islander Americans in the electoral and public policy processes at the national, state and local levels. We envision a society in which all Asian Pacific Islander Americans

fully participate in and have access to the democratic process. As such, APIAVote has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in APIAVote's participation in a number of amicus briefs before the courts.

Asian American Business Roundtable

The Asian American Business Roundtable ("AABR") was established in 1989 to help Asian and other minority-owned businesses access federal procurement, expand their market base with the Federal Government as well as the commercial sector by providing information that is accurate and timely to enable them to make informed decisions beneficial to their companies. AABR has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in AABR's participation in a number of amicus briefs before the courts.

Asian American Indian Women of Ohio

Asian American Indian Women of Ohio ("AAIWO") was incorporated as a non-profit organization in 1989 in the State of Ohio. The AAIWO is an organization that attempts to reach out to Asian women at home and in the professional world. It aims to foster and support women for leadership; promote culture and education in society; establish networks for women; recognize the contribution of women to our society; and make contributions to society, thereby enhancing the image of Asian Indians in America. As such, AAIWO has a long-standing interest in voting rights and protecting the rights of Asian Indian women to access the polls.

This interest has resulted in AAIWO's participation in a number of amicus briefs before the courts.

Asian American Institute

The Asian American Institute ("AAI") is the Midwest region's pan-Asian, nonprofit organization, whose mission is to empower the Asian American & Pacific Islander community through advocacy, utilizing research, education, and coalition-building. AAI is committed to ensuring that Asian Americans are able to vote, unencumbered by barriers including language access and inaccessible poll sites. Through AAI's poll watching and exit polling, AAI has documented the difficulties that place unwarranted burdens upon Asian American voters. AAI thus opposes the voter identification law presented.

Asian Law Alliance

The Asian Law Alliance ("ALA") is a local non-profit, non-partisan organization whose mission is to ensure equal access to the justice system to Asian and Pacific Islanders and low income residents of Santa Clara County through legal services, community education and advocacy. Founded in 1977, ALA has a long standing interest in voting rights and protecting the rights of Asian and Pacific Islanders to access the polls.

Asian Law Caucus

The Asian Law Caucus is the nation's oldest legal and civil rights organization serving the low-income Asian Pacific American communities. The mission of the Asian Law Caucus is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities

continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islander. Such pursuit includes an interest in voting rights and protecting the rights of Asian Americans to access the polls, which in turn has resulted in the Asian Law Caucus' participation in a number of amicus briefs before the courts.

Asian Pacific American Labor Alliance, AFL-CIO

The Asian Pacific American Labor Alliance ("APALA"), AFL-CIO, is the first and only national organization of Asian Pacific American union members. It organizes and works with Asian Pacific American workers, many of them immigrants, to build the labor movement and address exploitative conditions in the garment, electronics, hotel and restaurant, food processing, and health care industries. APALA has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in APALA's participation in a number of amicus briefs before the courts.

Asian Pacific American Legal Center of Southern California

The Asian Pacific American Legal Center of Southern California ("APALC") is the largest provider of direct legal services, civil rights advocacy, community education, and impact litigation for low-income Asian and Pacific Islander Americans in the country. Since 1982, APALC has represented APIAs in a number of areas, including

antidiscrimination, workers' rights, family law, immigration, and hate crimes. For 15 years, APALC has conducted election day poll monitoring to ensure equal access to the ballot for APIA and other voters who face barriers to voting because of their limited English proficiency, unfamiliarity with the voting process, or perceived status as outsiders. APALC is committed to protecting the voting rights of historically disenfranchised communities.

Asian Pacific Islander Legal Outreach

Asian Pacific Islander Legal Outreach (formerly Nihonmachi Legal Outreach), is a community-based, social justice organization serving the Asian and Pacific Islander ("API") communities of the Greater Bay Area. Our mission is to promote culturally and linguistically appropriate services for the most marginalized segments of the API community. With a staff of 20 in offices in San Francisco and Oakland, we provide legal, social, and educational services in more than a dozen languages and dialects including Cantonese, Chiu-Chow, Hindi, Ilocano, Japanese, Korean, Lao, Mandarin, Spanish, Tagalog, Taiwanese, Urdu, and Vietnamese. Our work is currently focused in the areas of domestic violence, violence against women, immigration and immigrant rights, senior law and elder abuse, human trafficking, public benefits, and social justice issues. We have a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in our participation in a number of amicus briefs before the courts.

Chinese for Affirmative Action

Chinese for Affirmative Action ("CAA") was founded in 1969 to protect the civil and political rights of Chinese Americans and advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community. We advocate for systemic change that remedies racial injustice, ensures equal opportunities for communities of color, reduces language barriers, and promotes immigrant rights. CAA has a long-standing interest in voting rights and protecting the rights of Chinese Americans to access the polls. This interest has resulted in CAA's participation in a number of amicus briefs before the courts.

Filipinos for Affirmative Action

Filipinos for Affirmative Action ("FAA") was established in Oakland, CA, in 1973 in response to the growing influx of immigrants from the Philippines and the discrimination they faced as newcomers to the U.S. Today, FAA strives to build a strong and empowered Filipino community by organizing constituents, developing leaders, providing services, and advocating for policies that promote social and economic justice and equity. FAA has a long-standing interest in voting rights and protecting the rights of Filipino Americans to access the polls. For many years we have helped newcomers become citizens, encouraged them to register to vote, and conduct voter mobilization efforts to increase participation in the electoral process. This interest has resulted in FAA's participation in a number of amicus briefs particularly where it involves protecting and expanding voting rights.

Hmong National Development, Inc.
Hmong National Development, Inc. ("HND") is a national 501(c)(3) nonprofit organization dedicated to building capacity, developing leadership and empowering the Hmong American community. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, increase community capacity, and develop resources for the well-being, growth, and full participation of Hmong in society. HND has a long-standing interest in ensuring and protecting the voting rights of all Hmong to access the polls. This interest has resulted in HND's participation in a number of amicus briefs before the courts.

Japanese American Citizens League
The Japanese American Citizens League ("JACL"), the nation's oldest and largest Asian American civil rights organization, is a membership-based organization whose mission is to secure and maintain the human and civil rights of Americans of Japanese ancestry and others victimized by injustice. While the JACL's founding mission was focused on protecting the civil rights of Americans of Japanese ancestry, today we are committed to protecting the rights of all segments of the Asian Pacific American community. As such, we have a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in our participation in a number of amicus briefs before the courts.

Korean American Coalition

The Korean American Coalition ("KAC") is a non-profit, non-partisan, community advocacy organization. Established in 1983, its mission is to promote the civic and civil rights interests of the Korean American community, through education, community organizing, leadership development, and multiethnic coalition building. Accordingly, KAC takes a strong interest in protecting the voting rights of Korean Americans, which includes access to the polls. Such interest has resulted in our participation in a number of amicus briefs before the courts.

Leadership Education for Asian Pacifics

Leadership Education for Asian Pacifics' ("LEAP") mission is to achieve full participation and equality for Asian Americans and Pacific Islanders through leadership, empowerment, and policy. It is a national, nonprofit organization, that works to achieve its mission by: developing people, because leaders are made, not born; informing society, because leaders know the issues; and empowering communities, because leaders are grounded in strong, vibrant communities. LEAP has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in LEAP's participation in a number of amicus briefs before the courts.

Na Loio Immigrant Rights and Public Interest Legal Center

The Na Loio Immigrant Rights and Public Interest Legal Center ("Na Loio") is a non-profit organization, established in 1983, whose mission is to provide statewide legal services, community education, and

advocacy in the public interest for vulnerable Hawai'i residents including low income immigrants, refugees, and other persons seeking justice. Na Loio has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. As a result of Na Loio's interest in voting rights and access to the polls, we have informally monitored Hawai'i's voting polls and, where appropriate, registered concerns with state and county entities regarding access to the polls.

National Alliance of Vietnamese American Service Agencies

The National Alliance of Vietnamese American Service Agencies ("NAVASA") is a national advocacy agency currently comprised of 34 community-based organizations and faith-based organizations. Since its incorporation in 1995 as a non-profit 501(c)(3) organization, NAVASA has promoted economic self-sufficiency and active citizenship for Vietnamese-Americans through full participation in the political system. NAVASA is committed to assisting its affiliates address the linguistic, social, economic, and civic needs facing community members in their specific localities. To empower the Vietnamese community in the United States and facilitate the transition of Vietnamese refugees and immigrants from dependency to self-sufficiency, NAVASA has maintained a strong interest in the voting rights of Vietnamese Americans. This interest has resulted in our participation in a number of amicus briefs before the courts.

National Asian Pacific American Bar Association

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the Asian Pacific American community and represents the interests of over 40,000 attorneys and 50 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans, NAPABA works to protect Asian Pacific Americans' right to vote and participate in the electoral process.

National Asian Pacific American Women's Forum

The National Asian Pacific American Women's Forum ("NAPAWF") is the only national, multi-issue Asian Pacific American ("APA") women's organization in the country and works to build a movement to advance social justice and human rights for APA women and girls. To this end, NAPAWF supports protecting the right of all individuals to engage in the democratic process by having access to the polls.

National Coalition for Asian Pacific American Community Development

The National Coalition for Asian Pacific American Community Development ("National CAPACD") is a membership-based network of local community-based agencies who are active players in various social and economic empowerment movements that came together after the Civil Rights era and developed through the War on Poverty initiatives. Our member organizations are 5-35 years old and serve Asian Americans, Pacific Islander, Native, refugee, immigrant, and low-income communities. We have a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in National CAPACD's participation in a number of amicus briefs before the courts.

National Korean American Service & Education Consortium

The National Korean American Service & Education Consortium ("NAKASEC"), a national non-profit organization based in Los Angeles, California, was founded in 1994 by the following local community centers: Korean Resource Center ("KRC") in Los Angeles, Korean American Resource & Cultural Center ("KRCC") in Chicago and Empowering the Korean American Community ("YKASEC") in New York. As a multi-issue civil rights and human rights organization based in the Korean American community, NAKASEC's mission is to project a national progressive voice for Koreans Americans and promote their full participation in the United States. To this end, we promote equitable and just changes to the political and legislative systems through a combination of education and policy

advocacy with grassroots organizing and community mobilization. NAKASEC's long-standing interest in voting rights and protecting the rights of Korean Americans to access the polls has resulted in NAKASEC's participation in a number of amicus briefs before the courts.

Organization of Chinese Americans

In 1973, Organization of Chinese Americans ("OCA") was established with the vision of uniting Chinese Americans across the United States into one representative voice. Today, there are over 80 OCA chapters and affiliates across the country working on behalf of Americans of Asian and Pacific Islander descent to advance the social, political and economic well-being of Asian Pacific Americans in the United States. OCA has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in OCA's participation in a number of amicus briefs before the courts.

Sikh American Legal Defense and Education Fund

Sikh American Legal Defense and Education Fund ("SALDEF") is the oldest and largest Sikh American national non-profit civil rights and educational organization. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF has over a decade of experience in working with other Sikh and minority organizations in providing public policy, advocacy and community education on discrimination issues. SALDEF has a strong interest in voting rights and

protecting the rights of Asian Americans to access the polls.

Southeast Asia Resource Action Center

Southeast Asia Resource Action Center ("SEARAC") was founded in 1979 to facilitate the relocation of Southeast Asian refugees into American society as well as the development of nonprofit organizations led by and for Southeast Asians. SEARAC's principal mission is to advance the interests of Southeast Asian Americans by promoting community empowerment and leadership development, as well as advocating for and representing the diverse Southeast Asian American community on issues and concerns such as education, health care, safety, economic development, and civil rights. We also foster civic engagement among Southeast Asian Americans, and represent our communities at the national level in Washington, D.C. As such, we have a strong interest in the voting rights of Southeast Asian Americans and strive to protect their access to the polls.

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v.

MARION COUNTY ELECTION BOARD, *ET AL.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,

Petitioners,

v.

TODD ROKITA, *ET AL.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

[Voter ID Laws Have Discriminatory Impacts And Disenfranchise Asian American Voters]

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ADDITIONAL *AMICI CURIAE*

Additional *amici curiae* are the following organizations that represent Asian American voters and have conducted voter registration drives, voter education events, and election protection activities on Election Day.

Asian American Bar Association of New York
Asian American Bar Association of the Delaware Valley
Asian American Lawyers Association of Massachusetts
Asian Pacific American Agenda Coalition
Asian Pacific American Bar Association
of the Greater Washington, DC Area
Asian Pacific American Lawyers
Association of New Jersey, Inc.
Asian and Pacific Islander American Vote
Cambodian Association of Greater Philadelphia
Chinatown Voter Education Alliance
Coalition of Asian Pacific Americans of Virginia
Conference on Asian Pacific American Leadership
Korean American Bar Association of New Jersey
Korean American League for Civic Action
Korean American Resource & Cultural Center
Korean American Voters' Council of NY & NJ
National Korean American Service &
Education Consortium
Organization of Chinese Americans ONE Lowell
Pennsylvania Immigration and Citizenship Coalition
Providence Youth Student Movement
The Sikh Coalition
South Asian American Leaders of Tomorrow
South Asian Youth Action
Vietnamese American Initiative for Development
YKASEC – Empowering the Korean American Community

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INTERESTS OF *AMICI CURIAE*[1]

Non-parties Asian American Legal Defense and Education Fund ("AALDEF"), Asian American Bar Association of New York, Asian American Bar Association of the Delaware Valley, Asian American Lawyers Association of Massachusetts, Asian Pacific American Agenda Coalition, Asian Pacific American Bar Association of the Greater Washington, DC Area, Asian Pacific American Lawyers Association of New Jersey Inc., Asian and Pacific Islander American Vote, Cambodian Association of Greater Philadelphia, Chinatown Voter Education Alliance, Coalition of Asian Pacific Americans of Virginia, Conference on Asian Pacific American Leadership, Korean American Bar Association of New Jersey, Korean American League for Civic Action, Korean American Resource & Cultural Center, Korean American Voters' Council of NY & NJ, National Korean American Service & Education Consortium, Organization of Chinese Americans, ONE Lowell, Pennsylvania Immigration and Citizenship Coalition, Providence Youth Student Movement, The Sikh Coalition, South Asian American Leaders of Tomorrow, South Asian Youth Action, Vietnamese American Initiative for Development, and YKASEC – Empowering the Korean

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[1] Counsel for *Amici* researched and drafted this brief with the advice and consent of *Amici*. Petitioners and Respondents have consented to the filing of this brief. Consistent with Rule 37.6, this brief is not authored in whole or in part by counsel for any party. No person, other than *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

American Community (collectively, "*Amici Curiae*" or "*Amici*") are organizations that advocate on behalf of Asian American voters and have conducted voter registration drives, voter education events, and election protection activities on Election Day.

Amici submit this brief in support of Petitioners' position that the State of Indiana's voter identification requirement and provisional balloting law ("SEA 483" or the "Act") violates the First and Fourteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

Asian American Legal Defense and Education Fund ("AALDEF") is a 33-year-old national civil rights organization that protects and promotes the civil rights of Asian Americans through litigation, advocacy, and community education.

Throughout the history of the United States, Asian Americans have been disenfranchised by discriminatory laws and practices. Such laws, like those that prohibited Asian Americans from becoming naturalized citizens or exercising the right to vote, have since been repealed. Many discriminatory practices have likewise been barred by the Fourteenth and Fifteenth Amendments and laws made under those Amendments' enforcement powers. But the legacy of those discriminatory laws and practices, including the notion that Asian Americans are still

viewed as foreigners, persists. That legacy prevents equal civic participation by Asian Americans.

That Asian Americans continue to be denied equal access to the ballot box is one manifestation of that legacy. Through poll monitoring efforts over several past national election cycles, AALDEF, with the assistance of *Amici* and other Asian American organizations, has amassed evidence showing that Asian Americans still face outright hostility when attempting to vote. Further, AALDEF has witnessed Asian Americans being disenfranchised by institutional barriers such as incomplete voter rolls, denials of provisional ballots, improper identification checks, interpreter shortages, and inadequate training for poll workers.

Turning to SEA 483, that law severely impairs the right of citizens in Indiana to vote by depriving any person who lacks an Indiana or United States government-issued photo identification the right to cast a vote and have that vote counted, irrespective of the voter's qualification or ability to provide reasonable indicia of qualification and registration. The strict and unyielding hurdles for the identification of voters imposed by SEA 483 compound the institutional barriers Asian American voters regularly face when attempting to vote.

SEA 483 also affords unbridled discretion to poll workers in the voter identification process, giving poll workers and partisan challengers ample opportunity

to discriminate against Asian Americans and other minorities.

The burdens imposed by SEA 483, coupled with the persistent racial and xenophobic animus and institutional barriers placed on Asian Americans, will severely and disproportionately infringe Asian Americans' right to vote. As such, SEA 483 fails to satisfy the strict scrutiny standard. Nor can the Act pass constitutional muster under the test proffered by this Court in *Burdick v. Takushi*, and mistakenly applied to SEA 483 by the courts below. Under either test, a law restricting the right of citizens to vote and have their vote counted must be weighed against the competing interests of voters to access the ballot and be free from discrimination. If the law is either unnecessary to advance the State's proffered interest or infringes too greatly on the ability of qualified voters to vote or be free from discrimination, the law must fail. Here, the restrictions imposed by SEA 483 are not justified by Indiana's interest in deterring unsubstantiated and speculative in-person voter fraud. Accordingly, SEA 483 cannot pass constitutional muster.

ARGUMENT

I. The Courts Below Erred in Subjecting SEA 483 to the Burdick/Anderson Balancing Test Rather Than Strict Scrutiny

It is well-established that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Harper v. Virginia*, 383 U.S. 663, 667 (1966); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[B]efore the right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close scrutiny.").

The Supreme Court has consistently held, without reservation, that strict scrutiny applies to *any* law that restricts the right of a voter qualified by age, citizenship, and residency to vote and have that vote counted. *Hill v. Stone*, 421 U.S. 289, 297 (1975) (*citing Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969)).

Further, strict scrutiny applies to classifications intended to verify residence, age, or citizenship. *Dunn*, 405 U.S. at 337, 345 & n.7 (applying strict scrutiny to a durational residency requirement purportedly meant to ensure bona fide residence, and holding that strict scrutiny applied to a declaration of citizenship prerequisite).

Under SEA 483, in-person voters in Indiana will not have their votes counted unless they present a valid government-issued identification or sign an

affidavit establishing lack of identification based on indigence or religious opposition to being photographed.[2] As such, SEA 483 is a classification restricting the franchise and is subject to strict scrutiny. It makes no difference that the Act prevents qualified citizens' votes from being counted rather than preventing the citizen from casting his or her ballot. The right to have one's vote counted is an integral part of the right to vote and is subject to the same level of protection as the right to vote in the first instance. *Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964) (*citing United States v. Mosley*, 238 U.S. 383, 386 (1915); *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J. dissenting)); *see also Bush v. Gore*, 531 U.S. 98, 105 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.")

Despite this Court's admonition that any law restricting the right to vote or to have that vote counted is subject to strict scrutiny, both courts below incorrectly applied a less exacting standard based on *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Burdick* held that the rigorousness of a court's inquiry into the propriety of a state election law depends upon the extent to which the challenged regulation burdens

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[2] SEA 483 provides a limited exception from the identification requirement for residents of state-licensed care facilities who are voting in that same facility.

First and Fourteenth Amendment Rights. *Burdick*, 504 U.S. at 434. Where an election law subjects voting rights to "severe restrictions," the law must satisfy strict scrutiny. *Id.* Where, however, the law places only "reasonable nondiscriminatory restrictions" upon the rights of voters or candidates, the law is subjected to a less stringent balancing test articulated in *Anderson*. *Id.* (*citing Anderson*, 460 U.S. at 788-89 & n.9).

Both of the courts below subjected SEA 483 to a lesser level of scrutiny based on the assumption that the number of people who will be wrongfully disenfranchised by the law will be small. The district court found that, while it "do[es] not doubt" that SEA 483 will prevent qualified registered voters from having their votes counted, the Petitioners' evidence was insufficient to establish that a large number of voters will be disenfranchised by the law. *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 823 (S.D. Ind. 2006). On appeal, the Seventh Circuit agreed that there are "no doubt . . . at least a few" eligible voters who will be disenfranchised by SEA 483. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). The majority assumed, however, that the number of disenfranchised voters would be small, and held that this reduced the constitutional threshold to a review less exacting than strict scrutiny. *Id.*

The lower courts erred because the right to vote is an individual right, *United States v. Bathgate*, 246 U.S. 220, 227 (1918), and the severity of a restriction on this right must be measured at the individual

level. The number of persons denied the right to vote does not affect the severity of denying the franchise to a qualified but disenfranchised voter. Indeed, the concern that voting restrictions will block otherwise powerless minorities makes such restrictions suspect in the first instance. *Kramer*, 395 U.S. at 626-28.[3]

Neither *Anderson* nor *Burdick* suggest that the Court modified the applicability of strict scrutiny to voter restrictions based on the number of qualified voters potentially disenfranchised by the law in question. Moreover, *Anderson* and *Burdick* concerned laws touching, but not directly infringing, the right to vote. To suggest these decisions can be used to undermine the long-standing constitutional protections for "a fundamental political right . . . preservative of all rights" ignores this Court's rulings in numerous

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[3] In fact, language in *Harper* suggests that this Court has considered and rejected the notion that the applicability of strict scrutiny to laws restricting the right of qualified citizens to vote could depend upon the number of people the law would disenfranchise. Reaffirming that strict scrutiny would apply to a review of Virginia's $1.50 poll tax, this Court explained:

> We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.
>
> * * *
>
> The degree of discrimination is irrelevant.

Harper, 383 U.S. at 668.

seminal voting rights cases. *Reynolds*, 377 U.S. at 561-62 (*quoting Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *Kramer*, 395 U.S. at 626.

II. Under Either Standard, SEA 483 Must Be Necessary to Advance the Proffered State Interests and Narrowly Tailored to Those Interests

Evaluating SEA 483 under strict scrutiny, Indiana must "show that [the restrictions of the Act] further a very substantial state interest," and that "the exclusions are *necessary* to promote a *compelling* state interest."[4] *Dunn*, 405 U.S. at 337, 343 (emphasis in original) (*quoting Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969); *citing Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 205, 209 (1970); *Harper*, 383 U.S. at 670). Prevention of voter fraud, if it exists, is a legitimate and compelling governmental end. *See Dunn*, 405 U.S. at 346. But the means Indiana

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[4] An election law aimed at preventing election fraud must be "necessary" to further that interest. *Kramer*, 395 U.S. at 627. In other words, the classifications must be tailored with "sufficient precision" so that the disenfranchisement of the persons prevented from voting under the law "is necessary to achieve the articulated goal." *Id.* at 632. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn*, 405 U.S. at 343.

may employ in pursuing such an end must not abrogate the First and Fourteenth Amendments.

Even under *Burdick* and *Anderson*, SEA 483 must be both necessary and sufficiently tailored to Indiana's interest if it is to pass Constitutional scrutiny. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Stevens, J. concurring) ("[I]n practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).").

As explained in *Anderson*, where an election law is not subject to strict scrutiny but is subject to a balancing of competing interests, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Furthermore, "[i]n passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." It is "[o]nly after weighing all these factors [that] the reviewing court [is] in a position to decide whether the challenged provision is unconstitutional." *Id.* While "[t]he quantum of empirical evidence needed to satisfy the heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised[,]" the

Court will "never accept[] mere conjecture as adequate" support for a law infringing on a fundamental right. *Nixon*, 528 U.S. at 391.

Accordingly, under either standard, the legitimacy and strength of the governmental interests behind SEA 483 must be assessed against the burden placed on the right to vote. That assessment must consider whether the Act's restrictions are necessary and whether its goals could be achieved through less burdensome measures.

III. SEA 483 Is Unconstitutional Because It Unduly and Severely Burdens the Voting Rights of Asian Americans and Other Minority Voters and Its Restrictions Are Neither Necessary nor Narrowly Tailored to the Prevention of Voting Fraud

By disenfranchising voters where less burdensome and more effective alternatives are available, SEA 483 is unconstitutionally overbroad under strict scrutiny or the *Burdick* and *Anderson* balancing test.[5]

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[5] SEA 483 presumptively disenfranchises any person attempting to vote in person who does not present acceptable government-issued photo identification at the time they attempt to vote. The law is thus overbroad in that it disenfranchises voters without identification meeting a narrow set of requirements, regardless of whether the voter can provide other reliable proof of identity and thus eliminate the claimed risk of voter fraud.

Compounding the disenfranchisement on Election Day are the severe and unnecessary burdens the Act places on those voters who extend the effort and decide to cast a provisional ballot. Any voter lacking ID must not only fill out a more time-consuming provisional ballot, but must also take further steps to get that provisional ballot counted. These steps include appearing before the county election board or county circuit court within 10 days of the election and obtaining documentation or identification, as required by the law, to have that provisional ballot counted. As the court below conceded, those substantial time[6] and financial costs on the provisional voter undoubtedly "deter some people from voting." *Crawford*, 472 F.3d at 951.

Moreover, these burdens on the right to vote are not borne equally by all members of society. As discussed below, Asian Americans are especially likely to be caught up in the over-expansive net cast by SEA 483 as a result of both intentional and unintentional discrimination. Further, persons with limited means will find it difficult to take the steps necessary to have their provisional ballots counted. Such foreseeable discriminatory impacts make the constitutionality of SEA 483

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[6] "[An] important cost that must be considered is the time it takes to get to the polls and go through the physical process of voting." Martin P. Wattenberg, *Turnout Decline in the U.S. and Other Advanced Industrial Democracies*, Center for the Study of Democracy, University of California Irvine, p. 3 (1998), *available at* http://repositories.cdlib.org/csd/98-08/ (last visited Nov. 1, 2007).

suspect, particularly given the State's inability to produce evidence that the voting fraud, which the Act is designed to combat, actually exists.

A. Indiana's Photo ID Law Violates the Equal Protection Clause Because It Is Impermissibly Vague and Will Lead to Discriminatory Disenfranchisement

Voting laws must, at a minimum, avoid arbitrary and disparate treatment of the electorate. *Bush*, 531 U.S. at 105. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104 (*quoting Harper*, 383 U.S. at 665). Indiana's voter identification law does not satisfy this standard.

SEA 483 sets unduly vague standards as to when a voter may be successfully challenged based on perceived discrepancies between the voter's identification and the name on the voter rolls or the voter's appearance. That vagueness, in turn, increases the risk and opportunity for the disproportionate disenfranchisement of certain racial and ethnic minorities. Such disenfranchisement could result from intentional or unintentional discrimination, or because some other inherent and immutable quality makes them more susceptible to challenge under the vague standards.

1. Indiana's Photo ID Law Is Unconstitutional Because It Gives Election Officials Unbridled Discretion and Will Lead to Arbitrary Enforcement

Laws placing the right to vote in the discretion of voting administrators have a history of being discriminatorily applied. *See South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966). This Court, however, has stood firm against such invidious discrimination, warning that, "[t]he cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 152 (1965). Indeed, this Court has consistently held that laws restricting fundamental rights like the right to vote and freedom of speech cannot pass constitutional muster when they provide their enforcers with too much discretion to deny rights afforded individual citizens. *See id.* (reading comprehension requirement for right to vote violated Fourteenth Amendment because too much opportunity for discriminatory enforcement); *see also City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (to avoid discriminatory enforcement, "laws must provide explicit standards for those who apply them"); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-53 (1969); *Cox v. State of Louisiana*, 379 U.S.

536, 555-58 (1965). As discussed, SEA 483 provides poll workers with substantial discretion to deny voters access to the regular ballot based on discrepancies concerning the voter's identification and thus violates the First and Fourteenth Amendments.

The risk of SEA 483 being applied discriminatorily is not remote. In 2004, *Amici* monitored almost 200 poll sites and conducted an exit poll of 10,789 Asian American voters to assess compliance with the Voting Rights Act and to document other voting barriers. They conducted these activities in 23 cities in eight states: New York, New Jersey, Massachusetts, Rhode Island, Michigan, Illinois, Pennsylvania, and Virginia. Through that and other poll monitoring efforts, *Amici* have found that voter identification requirements have significant racially discriminatory impacts.

Amici Curiae observed that Asian American voters were frequently targeted for discretionary identification challenges at the polls. The Help America Vote Act ("HAVA") requires a very limited group of voters—first-time voters who registered by mail and registered after January 1, 2003—to present identification in order to vote. 42 U.S.C. § 15483(b). *Amici Curiae* found, however, that identification was demanded from a much broader category of voters, especially in states which have no identification requirements above those imposed by HAVA:

- In New York, 23% of all Asian American voters surveyed had to show identification in

order to vote. Of those who provided identification, 69% were not required to under HAVA. Many South Asian voters complained that they were racially profiled. In Chinatown, a police officer required all Asian American voters to show picture identification and turned away voters if they did not have their IDs with them. In another incident, a voter was asked to show her naturalization certificate to prove her eligibility to vote.

- In New Jersey, where identification was also not required to vote, 25% of all Asian American voters surveyed had to show identification. Of those Asian Americans who provided identification, 51% were not required to show ID under HAVA. In one instance, an elderly first-time Korean American voter was asked to provide several forms of identification. Although this voter was required to present ID under HAVA, after he presented his voter registration card and other documents from the Board of Elections, he was nonetheless required to show a driver's license, utility bills, and other forms of ID before he could vote.
- In Massachusetts, 24% of Asian American voters had to show identification. Although state law allows poll workers to demand identification, such requests must be random, consistent, or based on a reasonable suspicion. Of those Asian American voters who had to show ID, 57% were not required to show ID under HAVA. One voter presented

his United States passport but was told that it was insufficient. The voter was turned away.

- In Virginia, where some form of documentary identification is required from all voters, *Amici* documented racially discriminatory requests. One South Asian voter complained that he was asked by poll workers to show identification, but his white companion, who was also voting at this site, was not asked to show any identification whatsoever. Moreover, this voter was required to present some type of *federal* identification in addition to his Virginia voter card. Under state law, a Virginia voter card is considered a valid form of identification.

See AALDEF, *Asian American Access to Democracy in the 2004 Elections* (Aug. 2005), at 18-20, *available at* http://www.aaldef.org/articles/2005-08-18_189_AsianAmericanA.pdf.

Racially discriminatory identification checks continue to affect Asian Americans nationwide. Notwithstanding complaints to election officials after the 2004 elections, poll workers continued to make improper demands for Asian American voters to provide identification during the 2006 elections. For example, in Boston's 2006 elections, an official elections Chinese interpreter asked all Chinese-speaking voters, but none of the English-speaking voters, for their ID before they could receive a translated ballot.

Through exit poll monitoring, *Amici* have also continued to find high rates of discretionary identification checks aimed at Asian American voters during the 2006 elections. In New York, 83% of Asian American voters who were required to show ID at the polls were not required to do so under HAVA. The percentages were equally high for other states: New Jersey 88%; Massachusetts 55%; Pennsylvania 76%; Michigan 54%; Illinois 83%; Maryland 61%; Washington 81%; and Washington, DC 58%. *See* AALDEF, *The Asian American Voter in the 2006 Midterm Elections* (2007) at 16, *available at* http://www.aaldef.org/docs/AALDEF2006ExitPollReportMay2007.pdf; AALDEF, *Asian American Access to Democracy in the 2006 Elections* (forthcoming 2007).

In addition, poll workers have applied disparate and illegal standards when examining Asian Americans' identification. During the 2002 elections in New York, one poll worker was observed requiring identification only from Asian American voters. *See* AALDEF, *Asian American Access to Democracy in the 2002 Elections in NYC* (Sept. 2003), at 20, *available at* http://www.aaldef.org/images/09-04-03_accessdemocracy.pdf. During the 2001 elections, in the wake of the September 11 attacks, another poll worker justified his own arbitrary requirement that Asian Americans present three forms of ID by saying, "you never know who's a terrorist." *See* AALDEF, *Asian American Access to Democracy in the 2001 Elections in NYC* (Apr. 2002) at 18, *available at* http://www.aaldef.org/docs/aaldef-203-report-2001.pdf. These examples suggest

that the era of selectively challenging minorities at the polls has not passed and should give the Court serious pause before permitting a new discretionary test that provides ample opportunity for discriminatory application by poll workers.

AALDEF has long urged that poll workers should be better trained on the legal requirements in voting. The New York City Board of Elections provided special training in 2004 that stressed specific ID rules and non-discriminatory application. Nevertheless, identification was still required of a large number of minority voters on Election Day.

If photo identification requirements like Indiana's are approved by this Court, AALDEF's findings demonstrate that those requirements would be misapplied and discriminatorily applied only to minority voters. Even if voters had acceptable forms of ID, poll workers could reject them as insufficient and demand additional documents. Such requirements would likely operate to disenfranchise Asian American voters.

The fact that SEA 483 requires all voters to present identification at the polls does not eliminate the risk of the law being applied discriminatorily to disenfranchise minority voters. Under SEA 483, a voter must produce identification that "shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record." Ind. Code § 3-5-2-40.5. The identification must also have a photograph

of the voter. Ind. Code § 3-5-2-40.5. A voter may thus be challenged based on the non-conformity of his/her name as it appears on the proffered identification when compared with the voter registry, or on account of a judgment by the poll worker that the photograph does not sufficiently match the appearance of the voter.

With respect to the photograph, it is obvious that allowing a poll worker to challenge a voter based on an ID photo, which may be several years old, will create substantial potential for abuse in the application of SEA 483. That abuse is one that will be difficult to defeat given the impossibility of creating an objective standard by which to judge the similarities between a photograph and an individual.

With respect to the requirement that the name on the identification and the voter rolls "conform," there is also a significant potential for abuse. There is no statutory definition of "conform" in Indiana and as such, poll workers will have nearly unfettered discretion to accept or reject a voter if there is any difference between the name as it appears on the identification and on the voter registry. A poll worker has absolute power to determine for himself or herself whether "conform" means "the same as" or "like" or "of the same form" or whether it means "similar." The individuals making these decisions are not required to have legal training or any type of advanced education. *See* Ind. Code § 3-6-6-7(a)(1)-(5).

Without a statutory definition of "conform," and no apparent limitations on what will justify challenging a voter based on the photograph on his or her ID, the poll workers can act with unbridled discretion. Such vagueness will encourage arbitrary and erratic enforcement by poll workers and election officials and, as such, renders Indiana's photo ID law facially unconstitutional. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (to avoid discriminatory enforcement, "laws must provide explicit standards for those who apply them"); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-53 (1969) (discussing the unconstitutionality of a statute which "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways"); *Cox v. State of La.*, 379 U.S. 536, 555-58 (1965) (holding a statute unconstitutional which "provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials").

2. Asian Americans and Other Minority Voters Will Be Particularly Susceptible to Disenfranchisement Under SEA 483

Even if Indiana's voter identification law were applied without any overt racial animus, AALDEF has observed that typographical and data-entry

errors are especially common with Asian American names in voter registration rolls. *See* AALDEF, *Asian American Access to Democracy in the 2004 Elections* (Aug. 2005), at 17; AALDEF, *Asian American Access to Democracy in the 2002 Elections in NYC* (Sept. 2003), at 22. These errors occur by no fault of the eligible voter and can result in a failed match between the name listed on the voter registration rolls and the name listed on the photo identification presented by voters on Election Day.

Such voter roll errors are of particular concern for Asian American and other minority voters. Different traditional naming conventions across cultures and peoples of different national origins, as well as difficulties in transliterating names from cultures that do not use the Roman alphabet, frequently contribute to errors or discrepancies in the way a given individual's name is recorded in various public records. Errors are especially prevalent with Asian names, in which the surname is traditionally listed before the given name. For example, Chinese given names may have two "characters" or parts, which commonly leads to transcription errors. Lastly, Asian names are often misspelled or mispronounced, leading to confusion.

AALDEF has recorded many instances in which eligible voters have been told their names are not on the rolls because frustrated poll workers do not want to spend extra time seeking out "foreign" sounding names or reconciling identification inconsistencies. *See* AALDEF, *Asian American Access to Democracy in*

the 2004 Elections (Aug. 2005), at 17; AALDEF, *Asian American Access to Democracy in the 2002 Elections in NYC* (Sept. 2003), at 22.

The result is that, even where there is no overt discriminatory intent, vague standards can lead to substantial disenfranchisement of Asian American voters. Indeed, even if Indiana could provide a more concrete definition of what it means for a name on the registration to "conform" to the name on the voter's identification, the problems identified above will still lead to a disproportionate disenfranchisement of minority voters unless the law is rewritten to provide adequate safeguards for persons who are the victims of such registration errors.

Resolution of these inconsistencies is also likely to be especially difficult for Asian American and other minority voters who may be hindered in communicating with poll workers due to language barriers. Indeed, it is common, even in cities like New York, which must provide language assistance under the Voting Rights Act, for there to be voting barriers due to an inadequate number of translators. *See* AALDEF, *Asian Americans and the Voting Rights Act: The Case for Reauthorization* (May 2006), at 21, *available at* http://www.aaldef.org/articles/2006-06-13_137_AALDEF Releases.pdf.

3. Discriminatory Opportunities Created by SEA 483 Are Compounded Because Indiana Law Permits Partisan Challenges to Individual Voters at the Polls

Indiana permits a political party with a candidate on the ballot in a precinct to appoint a challenger.[7] Ind. Code § 3-6-7-1. In 2005, the Indiana legislature changed the law to allow the political challenger access inside the polling place, which means the political challenger is present when a voter is showing proof of identification to the precinct election board. Ind. Code § 3-11-8-15(a)(5).

Ind. Code § 3-11-8-20 provides: "If a voter offering to vote is challenged by a challenger or by a member of the precinct election board, the person challenging the voter shall reduce the challenge to affidavit form, setting forth succinctly the reasons for the challenge." Ind. Code § 3-11-8-22 states that a voter successfully challenged under Ind. Code § 3-11-8-20 may vote if the voter completes an affidavit, but relegates the challenged voter to a provisional ballot. Provisional balloting, however, is an ineffective remedy for such challenges because of the added administrative burdens the voter must undertake before the provisional ballot

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[7] The requirements to serve as a challenger are minimal. A challenger is only required to be at least 18 years of age, Ind. Code § 3-6-7-1(c), and a registered voter in the county containing the precinct where the challenger is stationed. Ind. Code § 3-6-7-1.7.

can be counted. Indeed, as a practical matter, a substantial proportion of provisional ballots are never counted. *See* Indiana 2006 General Election Provisional Ballot Information, *available at* http://www.in.gov/sos/elections/pdfs/2006GeneralElectionProvisionalBallotCount090507.pdf (last visited Nov. 7, 2007); Indiana 2006 Primary Provisional Ballot Information, *available at* http://www.in.gov/sos/elections/elections/2006PrimaryElectionProvisionalBallotCount.xls (last visited Nov. 7, 2007); *see also* Deposition of Doris Ann Sadler (Aug. 2, 2005), at 44:3-11, Attachment 2 to Motion For Summary Judgment filed by William Crawford.

In addition, AALDEF's election monitoring found that poll workers often denied Asian American voters the right to cast provisional ballots, even when they qualified, further compounding the ineffectiveness of provisional ballots as a remedy. *See* AALDEF, *Asian American Access to Democracy in the 2004 Elections* (Aug. 2005), at 16-17.

Indiana law sets forth no limitations upon the types of challenges that can be made by a political challenger. Accordingly, partisan challengers may take advantage of the vagueness of SEA 483 to target voters from particular precincts or ethnic groups that are perceived as having a particular political affinity.

B. The Justification for SEA 483 Is Weak

1. Despite its Pretext, SEA 483 Increases the Impact of Voter Fraud by Decreasing Voter Turnout and Disproportionately Disenfranchising Asian American and Other Minority Voters

The Eagleton Institute of Politics at Rutgers University found that voters in states requiring photographic documentation of identity were 2.7 percent less likely to vote than voters in states where such documentation was not required. *See* Eagleton Institute of Politics, Rutgers University & Moritz College of Law, Ohio State University, *Best Practices To Improve Voter Identification Requirements* (Jun. 28, 2006), at 28, *available at* http://www.eac.gov/clearinghouse/docs/eagletons-draft-voter-id-report; *see also* Timothy Vercellotti and David Andersen, *Protecting the franchise, or restricting it? The effects of voter identification requirements on turnout* (Paper Prepared for American Political Science Association, Philadelphia, PA Aug. 31-Sept. 3, 2006, n.3, p. 4, 6). If SEA 483 produces a similar drop-off in voter turnout, the Act will clearly deter a much greater number of legitimate votes than it will deter fraudulent votes. *See* part III.B.2., *infra*.

The impact on minority voters is even more significant. Latino Americans were 10 percent less likely to vote in states with identification requirements, Asian Americans 8.5 percent less likely to vote, and African Americans 6.0 percent less likely to

vote. *See Best Practices To Improve Voter Identification Requirements*, at 29.

Amici are concerned that SEA 483, by disproportionately impacting minority voters, will dilute the voting power of the Asian American and other minority communities. This dilutive impact is much more significant than any purported dilutive effect of fraud. Indeed, as one commentator has noted, overcorrection for perceived voter fraud has historically come at the cost of those voters whose electoral voice is most threatened:

> The claim that voter fraud threatens the integrity of American elections is itself a fraud. It is being used to persuade the public that deceitful and criminal voters are manipulating the electoral system. . . . The exaggerated fear of voter fraud has a long history of scuttling efforts to make voting easier and more inclusive, especially for marginalized groups in American society. With renewed partisan vigor, fantasies of fraud are being spun again to undo some of the progress America has made lowering barriers to vote.

Lorraine C. Minnite, *The Politics of Voter Fraud* (2007), at 5, *available at* http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf.

2. There Is No Evidence of Significant In-Person Voting Fraud in Indiana or in the United States

Despite the procedural posture of summary judgment, the courts below required that Petitioners (the non-moving party) establish the number of people disenfranchised by SEA 483. But, conversely, both courts credited Indiana's interest in preventing voter fraud through a voter ID law as legitimate without any evidence of fraud that would be prevented by the State's voter identification requirement. Instead, the courts hypothesized that the evidence of voter fraud was lacking, not because it did not exist, but because it was merely not detected. *Indiana Democratic Party*, 458 F. Supp. 2d at 826; *Crawford*, 477 F.3d at 953. To support that supposition, the courts pointed to purported corroborating allegations of fraud in states other than Indiana. *Indiana Democratic Party*, 458 F. Supp. 2d at 826; *Crawford*, 477 F.3d at 953. Such conjecture from the lower courts was necessary to support the State's position as both the State and the courts below concede that there is no evidence of in-person voting fraud in Indiana.[8] *Indiana Democratic Party*, 458 F. Supp. 2d at 826; *Crawford*, 477 F.3d at 953.

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[8] Indiana's legislature did not consider any evidence of impersonation fraud prior to enacting SEA 483. *See Indiana Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 793 (S.D. Ind. 2007); *id.* at 785-86 ("Defendants concede that 'the State of Indiana is not aware of any incidents or person attempting to vote, or

(Continued on following page)

The lack of evidence of in-person voting fraud is not unique to Indiana; there is little evidence of the type of voter fraud that SEA 483 supposedly combats nationally.[9] A recent report prepared for the U.S. Election Assistance Commission ("EAC") in December 2006 found relatively little evidence of fraud at polling places. Interviews with numerous public officials, including state attorney generals, secretaries of states, and election officials, found large agreement that:

> [A]bsentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud.

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voting, at a voting place with fraudulent or otherwise false identification.' ") (citations omitted)). Nor has anyone ever been *charged* with, let alone convicted of, violating Indiana's voting laws. *Crawford.*, 472 F.3d at 955 (Evans, J. dissenting) ("the defenders of this law candidly acknowledged that no one – in the history of Indiana – had ever been *charged* with violating [voting fraud] law").

[9] As one commentator has recently noted: "Voter fraud is extremely rare. At the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005, an average of eight people a year. The available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definite, is also negligible." Minnite, *The Politics of Voter Fraud*, at 3. Notably, the vast majority of these convictions relate to ineligible felons voting, immigrants voting, vote buying, fraud in absentee voting and registration-related violations, as opposed to the type of in-person voter impersonation SEA 483 is designed to prevent. Minnite, *The Politics of Voter Fraud*, at 8.

> Many asserted that impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election.

See U.S. Election Assistance Commission, *Election Crimes: An Initial Review and Recommendations for Future Studies* (Dec. 2006), p. 7.[10]

There is little evidence to support the existence of in-person voter fraud. *See* Amicus Brief of Brennan Center for Justice (*to be filed* Nov. 12, 2007) (analyzing reports of fraud in record).

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[10] The anonymity inherent in absentee voting more easily allows those ballots to be compromised with less risk of the fraudster being discovered. Therefore it is those ballots that are most likely to be the target of fraud. Defendants' claims that fraud at polling stations is prevalent, on the other hand, are dubious at best. A potential imposter would have to gain access to an up-to-date registration list and identify a registered voter who is unlikely to vote. Then the imposter would typically have to present himself or herself as that voter to forge a signature or swear falsely as to his or her identity, committing a crime in public view, while running the risk of detection because 1) the real voter may have already appeared, 2) the voter roll may have been purged of invalid registrants or 3) the poll worker may be familiar with either the imposter or the legitimate voter. Finally, in order to affect the outcome of an election, the imposter would have to be in league with many such imposters, all of whom would have to undertake the same complicated steps. Therefore, it is unsurprising that there is no evidence of in-person voter impersonation fraud in Indiana.

3. The Severe Restrictions of SEA 483 Are Not Necessary or Sufficiently Tailored to the Goal of Preventing In-Person Voter Fraud

Even if there were some degree of in-person voting fraud that would justify further regulations on the franchise by the State, the restrictions on the right to vote in SEA 483 are far too severe and many of them do not advance the goal of deterring fraud. For example, SEA 483 requires that indigent persons without photo identification and persons religiously opposed to being photographed appear at the county circuit court or county election board no later than 10 days after the election to fill out an affidavit to that effect if they want their vote counted. Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5. There can be little reason to impose the additional burden on the voter to appear at another location and on another day to fill out that affidavit. It would be far less burdensome and no less effective in deterring fraud if voters were allowed to complete such affidavits at the time and place where they appear to vote.

Alternatively, if the affidavits are an effective means of identifying indigent and religiously constrained voters, there can be no reason to deny other voters the right to prove their identity by affidavit or other reliable means. *See Reynolds*, 377 U.S. at 565 ("[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged"). For example,

under SEA 483, a person who merely loses his identification or has it stolen is not even given the option of having his or her vote counted on the basis of an affidavit if he is not indigent or religiously opposed to being photographed. The Act thus discriminates against the victim of crime or loss compared to a religiously constrained or impoverished voter, even though the votes from such individuals are equally trustworthy when submitted under affidavit alone. Such distinctions are wholly unreasonable and do not withstand constitutional scrutiny. *Cf. Carrington v. Rash*, 380 U.S. 89, 95-96 (1965) (state could not reasonably create an irrebuttable presumption of non-residency for persons enlisted in the military while providing other transient classes of potential voters, like students, with the opportunity to show bona fide residency).

CONCLUSION

For each of the foregoing reasons, SEA 483 does not pass constitutional muster. *Amici* respectfully submit that this Court should reverse the decision of the court below and find that SEA 483 violates the strictures of the First and Fourteenth Amendments and cannot be enforced.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI*

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has monitored elections and conducted exit polls of Asian American voters in every major election since 1988.

The Asian American Bar Association of New York (AABANY) is a membership organization of attorneys, judges, law professors, legal professionals, legal assistants or paralegals, and law students concerned with issues affecting the Asian Pacific American community. AABANY works to advocate for the Asian Pacific American community and seeks to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession. AABANY is the regional affiliate of the National Asian Pacific American Bar Association.

The Asian American Bar Association of the Delaware Valley (AABADV) is a non-profit organization founded in 1984 to serve a wide network of Asian Pacific American attorneys admitted or practicing in Pennsylvania, Northern Delaware and Southern New Jersey. The AABADV is dedicated to the advancement of its members and the Asian American Community.

AABADV also educates its members about issues critical to Asian Pacific Americans and advances the interests of Asian Pacific American attorneys as well as the interests of the local community. AABADV has previously worked with AALDEF in monitoring elections and in conducting its Exit Poll of Asian American voters.

The Asian American Lawyers Association of Massachusetts (AALAM) is a non-partisan, non-profit organization of over one hundred Asian American lawyers, judges, law professors, and law students. AALAM's mission is to promote and enhance the Asian American legal profession by furthering and encouraging professional interaction and the exchange of ideas among its members and with other individuals, groups, and organizations. AALAM also strives to improve and facilitate the administration of law and justice. AALAM is a member organization of the National Asian Pacific American Bar Association.

The Asian Pacific American Agenda Coalition is a coalition of organizations and individuals who have come together to identify and to move forward a common agenda that addresses the needs of the Asian Pacific American communities in Massachusetts. Their mission is to promote and foster the development of Asian Pacific Americans and to ensure their full and equal participation in the social, economic, and political lives of their communities.

The Asian Pacific American Bar Association of the Greater Washington, DC (APABA-DC) Area is an

organization of attorneys, judges, law professors, law students, and other legal professionals dedicated to the advancement of Asian Pacific Americans. APABA-DC is the oldest and largest association of Asian Pacific American attorneys in the Washington, DC area. APABA-DC is an affiliate chapter of the National Asian Pacific American Bar Association.

The Asian Pacific American Lawyers Association of New Jersey, Inc. (APALA-NJ) is a Pan-Asian bar association serving Asian American attorneys throughout the state. APALA-NJ is working to promote and support a positive image of Asian Americans, educate members of the community about issues of critical concern to Asian Americans, and support the entrance and advancement of Asian Americans into and within the legal profession. APALA-NJ is the regional affiliate of the National Asian Pacific American Bar Association.

Asian and Pacific Islander American Vote (APIA Vote) is a national nonpartisan, nonprofit organization that encourages and promotes civic participation of Asian Pacific Islander Americans in the electoral and public policy processes at the national, state and local levels. APIA Vote envisions a society in which all Asian Pacific Islander Americans fully participate in and have access to the democratic process. APIA Vote conducted poll monitoring/exit polling during the 2006 elections.

The Cambodian Association of Greater Philadelphia, Inc. (CAGP) seeks to improve the quality of life

of Cambodian Americans within the greater Philadelphia area through direct services, advocacy, and cultural awareness. Since its inception, CAGP has developed and implemented many social, educational, and cultural programs helping Cambodian American families become self-sufficient. CAGP conducted poll monitoring/exit polling during the 2006 elections.

Chinatown Voter Education Alliance (CEVA) is a New York-based organization that promotes civic awareness and participation in the Chinese American community by collaborating with community agencies to increase voter registration and participation. CVEA's goal is to educate and encourage Chinese voters and bring community members together. Chinatown Voter Education Alliance has conducted poll monitoring/exit polling for the past several elections.

The Coalition of Asian Pacific Americans of Virginia (CAPAVA) aims to unify the Asian and Pacific Islander community to have an organized voice throughout the Commonwealth of Virginia. CAPAVA also seeks to promote active participation of Asian and Pacific Americans in the policy arena and support community organizing efforts. CAPAVA also supports and defends equal rights and opportunities for all Asian and Pacific Americans. CAPAVA conducted poll monitoring/exit polling during the 2006 election.

Conference on Asian Pacific American Leadership (CAPAL) is a non-partisan educational organization

that was founded by Asian Pacific American professionals in the Washington, DC metropolitan area. Its mission is to promote APA interests and success in public sector careers, to provide information and education on policy issues affecting the APA community, and to serve the APA community at large. CAPAL assisted in conducting poll monitoring/exit polling during the 2006 election.

The Korean American Bar Association of New Jersey (KABA-NJ) fosters the exchange of ideas and information among and between KABA-NJ members and other members of the legal profession, the judiciary and the community; to encourage and promote the professional growth of KABA-NJ members; to provide an opportunity for fellowship among KABA-NJ members; to provide service to the general and local community; to develop and encourage cooperation with other organizations of minority attorneys; and to provide a vehicle and forum for the unified expression of opinions and positions by KABA-NJ on current social, political, economic, legal or other matters or events of concern to the members of KABA-NJ.

The Korean American League for Civic Action (KALCA) is a leading non-partisan advocacy organization dedicated to promoting the civic participation of Korean Americans and Asian Pacific Americans in New York. KALCA aims to improve civil society and American democracy with a more engaged electorate and works to encourage greater participation by the Korean American and Asian Pacific American communities

with community outreach, voter education, and voter registration drives. KALCA has conducted poll monitoring/exit polling in New York and New Jersey for the past several elections.

Korean American Resource & Cultural Center (KARCC), the Chicago affiliate of the National Korean American Service & Education Consortium, aims to empower the Korean American community through education, social service, organizing/advocacy and culture. Serving the Korean American community of greater Chicago, the organization strives to resolve issues facing the growing Korean American community. KRCC has conducted poll monitoring/exit polling for the past several elections.

The Korean American Voters' Council of New York & New Jersey is a coalition of organizations and individuals working to create greater civic participation in the Korean American community. KAVC conducts voter registration drives, translates and publishes voters' handbooks, and holds seminars about political candidates and issues. KAVC has also operated voter hotlines in Korean and assisted voters at poll sites. KAVC has conducted election poll monitoring/exit polling for the past several elections.

The National Korean American Service & Education Consortium (NAKASEC), a national non-profit organization based in Los Angeles, California, was founded in 1994 by local community centers: Korean Resource Center (KRC) in Los Angeles, Korean American Resource & Cultural Center (KRCC) in

Chicago, and YKASEC – Empowering the Korean American Community (YKASEC) in New York. The centers empower and improve the lives of Korean Americans as part of a greater goal of building a national movement for social change. NAKASEC is a multi-issue civil rights and human rights organization based in the Korean American community. NAKASEC's mission is to project a national progressive voice for Koreans Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through a combination of education and policy advocacy with grassroots organizing and community mobilization.

The Organization of Chinese Americans (OCA) is a national organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Chinese American community. OCA and its chapters have conducted poll monitoring/exit polling for the past several elections.

ONE Lowell is a non-profit organization in Lowell, Massachusetts that is dedicated to increasing the integration and self sufficiency of Lowell's immigrant populations by strengthening civic participation, developing strong leadership and increasing

access to vital services. ONE Lowell works with immigrant communities to register qualified voters and increase awareness about the traditions of democracy in America. The organization also works with local, state and national organizations to increase awareness about policies and legislation that affect the immigrant populations. ONE Lowell has conducted election poll monitoring/exit polling for the past several elections.

The Pennsylvania Immigration and Citizenship Coalition (PICC) is a diverse coalition of 50 member organizations and numerous individuals who represent the needs of immigrants, migrants, refugees and other new Americans living in Pennsylvania. PICC has numerous advocacy committees working to advocate for the rights of immigrants. PICC registers new citizens to vote and educates them on their rights. It conducted poll monitoring/exit polling during the 2004 and 2006 elections.

Providence Youth Student Movement (PrYSM) is a local grassroots organization that works with Southeast Asian American youth and families to confront and end state, street, and interpersonal violence in Providence, Rhode Island. Through programs, campaigns, and community building, PrYSM focuses on civil rights and social issues that affect immigrant youth. PrYSM conducted poll monitoring/exit polling during the 2004 election.

The Sikh Coalition works to defend civil rights and liberties for all people, promote community

empowerment and civic engagement within the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination, and educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities. Ensuring that Sikhs have free access to the polls is fundamental to this mission. The Sikh Coalition believes that any attempt to suppress the right to vote is contrary to the laws and traditions of the United States. The Sikh Coalition conducted poll monitoring/exit polling during the 2004 and 2006 elections.

South Asian American Leaders of Tomorrow (SAALT) is a national coalition of organizations and individuals working in the South Asian community dedicated to ensuring the full and equal participation by South Asians in the civic and political life of the United States. SAALT works to unify the South Asian community in America and provide a voice on issues affecting South Asians that relate to equality and civil rights. South Asian American Leaders of Tomorrow conducted poll monitoring/exit polling during the 2004, 2005, and 2006 elections.

The South Asian Youth Action (SAYA!) is a community organization working to promote leadership and encourage the success of South Asian youth in the New York City area. SAYA! recognizes the importance of creating opportunities for South Asian youth and works to resolve the social issues that affect the South Asian community in a post-9/11 society. Through its programs and advocacy efforts SAYA!

works to create broad social and systematic changes that positively impact immigrant youth. SAYA! has conducted election poll monitoring/exit polling for the past several elections.

Vietnamese American Initiative for Development (VietAID) is a local organization dedicated to empowering the Vietnamese Community of the Boston metropolitan area through civic participation and community development. In preparation for the 2000 elections, VietAID conducted voter registration drives and mobilized voters, which led to an increased voter turnout by 47% in the Vietnamese American community. Vietnamese American Initiative for Development conducted poll monitoring/exit polling during the 2004 election.

YKASEC – Empowering the Korean American Community was established to meet the needs and concerns of the Korean American community through education, civic participation immigrant rights, social services and culture in New York. YKASEC works with various grassroots organizations on immigration policy and voter rights. YKASEC – Empowering the Korean American Community has conducted election poll monitoring/exit polling for the past several elections.

AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States
January Term, 2007

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS [MYTH OF VOTER IMPERSONATION FRAUD]

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Association of Community Organizations for Reform Now ("ACORN") respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

ACORN is a not-for-profit organization founded in 1970 which represents more than 350,000 member families in over 100 domestic and international cities. ACORN has two chapters in Indiana serving approximately 2,000 members. One of ACORN's goals is to increase civic participation by citizens existing on the outskirts of society. To that end, ACORN has sponsored hundreds of voter registration drives around the nation, resulting in the registration of over 1.5 million voters.

Indiana's Voter Identification ("ID") Law requires in-person voters to display government issued photo ID to poll workers on election day.[2] Low-income and homeless individuals are more likely to lack resources to obtain government issued photo ID, and the Indiana law will disproportionately prevent them from voting.[3]

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[1] Pursuant to Supreme Court Rule 37.6, the parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Ind. Code § 3-11-8-25.1.

[3] *See* App. 3 ("No doubt most people who don't have photo ID are low on the economic ladder . . . .").

Therefore, ACORN has an interest in the outcome of this case, which could prevent thousands of the citizens it serves from voting.

The purported rationale for Indiana's Voter ID Law is to prevent individuals from fraudulently casting ballots by impersonating registered voters on election day. Similarly fanciful allegations have been made repeatedly against ACORN's voter registration efforts. This brief explains, based on ACORN's experiences of registering voters and defending against allegations of voter fraud, that much of the supposed concern about voter impersonation has been contrived to justify legislation that deters low-income citizens from voting.

SUMMARY OF ARGUMENT

The decision below relied heavily on the empirical guess that a significant number of individuals vote fraudulently by impersonating registered voters. This unsupported hypothesis has fueled a national campaign to adopt statutes – like the Indiana law at issue in this case – that appear to protect the integrity of the election process but are actually designed to suppress voter participation by low and middle-income voters. Because it works hard to register exactly those voters and help them vote, ACORN has been the target of unfounded charges of voter impersonation fraud. Before ruling on the important issue presented by this case, the Court should consider the persuasive evidence that the myth of voter impersonation fraud has been a means for deterring people from voting. ACORN

supports protections for the integrity of elections, but not against phantom dangers conjured up in order to reduce exercise of the franchise.

ACORN operates at the front lines of the voter registration effort. Because ACORN's registration drives can threaten incumbent politicians and parties, ACORN has been the target of much of the vote-restriction effort, which has included legislative retaliations aimed at vote suppression. The myth of voter impersonation fraud is a central justification for restrictive voting laws like the Indiana Voter ID Law. The use of such unfounded allegations to obstruct ACORN's voter registration in Florida and Ohio provides a cautionary illustration of how this myth can distort the critical intersection between the legal system and the electoral system.

Based only on the empirical guess that voter impersonation fraud might happen somewhere, at some time, the Indiana Voter ID Law cannot meet the test for voting restrictions of *Burdick v. Takushi*, 504 U.S. 428 (1992). Created to resolve an unproved problem, the Indiana statute generates no significant benefits that would justify the acknowledged burdens it places on voting. Consequently, it violates the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I. The Indiana Statute Cannot Be Sustained Without a Finding of Substantial Voter Impersonation Fraud.

Indiana justifies its voter ID law solely as a remedy for voter impersonation fraud, that is, when a voter casts a ballot under a false identity.[4] Under *Burdick*, the statute's constitutionality turns on the balance between "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" and "the precise interests put forward by the State" to justify the burden imposed, taking into consideration whether the State's interests "make it necessary to burden the plaintiff's rights."[5]

In sustaining the statute, the court of appeals relied heavily on concerns of voter impersonation fraud voiced by proponents of the law. The court applied a reduced standard to the statute because "[t]he purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes."[6]

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[4] *See* App. 6-7 ("The purpose of the Indiana [voter ID] law is to reduce voting fraud. . . . Without requiring a photo ID, there is little if any chance of preventing [in-person voter impersonation] fraud . . . ."); Brief of State Respondents in Opposition to the Petitions, at 3, *Crawford v. Marion County Election Bd.*, No. 07-21 (U.S. Aug. 6, 2007) ("It was against this backdrop of . . . nationwide reports of in-person voter fraud that the Indiana General Assembly enacted the Voter ID Law in 2005.").

[5] 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). The Indiana statute deters individuals from voting altogether, while the Hawaii statute at issue in *Burdick* simply denied a voter the ability to write in a candidate's name in a jurisdiction where the standards for getting on the ballot were quite low. Accordingly, the interest threatened by the Indiana law is of much greater constitutional weight.

[6] App. 6.

Thus, it declined to apply a strict standard of review because "the right to vote is on both sides of the ledger."[7] If the concern for voter impersonation fraud is unfounded, or even materially overstated, the court below applied the wrong standard and came to the wrong outcome.

Elected officials have an interest in suppressing voting by groups not likely to vote for them. In close races, maximizing voter participation by candidates' supporters – and minimizing participation by their opponents – can have a decisive impact.[8] Consequently, vote suppression has assumed many forms in our history. Poll taxes and literacy tests are part of that ugly history.[9] Voter ID laws can be part of a twenty-first century

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[7] *Id.*

[8] The Indiana Voter ID Law was passed by Indiana's Republican-controlled legislature in 2005. As the court below noted, people "low on the economic ladder . . . are more likely to vote for Democratic than Republican candidates." App. 3.

[9] *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding poll taxes unconstitutional); *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) (holding that New York state could not impose an English literacy requirement on the right to vote); 42 U.S.C. § 1973- 1973aa-6 (1965) (outlawing literacy tests for voters); U.S. CONST. amend. XXIV (prohibiting states from denying the right to vote in federal elections because of failure to pay a poll tax); Steven Mintz, *Winning the Vote: A History of Voting Rights*, http://www.historynow.org/09_2004/historian1c.html (discussing the use of poll taxes and literacy tests to prevent African Americans from voting).

effort to achieve the goal of selectively deterring voting.[10]

II. ACORN's Successful Voter Registration Efforts Have Drawn False Charges of Fraud.

Many citizens in low-income and minority communities are alienated from the electoral process. As an organization of families in those communities, ACORN conducts grassroots voter registration drives in low-income and minority neighborhoods. In 2004, ACORN's drives yielded 1,131,768 new voters across 105 counties in twenty-six states. In 2006, ACORN workers helped 547,539 citizens register to vote in fifty-three localities in twenty states.

When ACORN embarks on a voter registration effort in a community, it recruits most of its workers from that community, then trains them about the requirements of state and local election law and ACORN's own quality control procedures. The voter registration workers canvas low and middle-income neighborhoods in areas where people congregate, including shopping centers, public transportation centers, universities, and community centers. ACORN workers interview individual registrants to confirm their addresses and to determine if they voted in the last presidential election. If the individuals did not vote in that election, the ACORN workers ask them if they would

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[10] *See* Lorraine C. Minnite, *The Politics of Voter Fraud* 15-17 (Project Vote), *available at* http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf.

like to fill out a new registration form. The forms are collected from workers every day and subjected to quality control review by supervisory personnel, which includes telephone calls to voters. Forms that raise any issues during the quality control review are separated for investigation and reported to election and/or law enforcement officials if warranted. The rest are submitted to the state or local election agency.[11]

As with any organization, ACORN is not immune from human error. Of the more than 1.5 million new voter registration forms submitted by ACORN in 2004 and 2006, approximately one-tenth of one percent have been incorrect due to errors by ACORN workers.[12] In no instance has it been demonstrated that an incorrect registration form resulted in a vote being cast by someone impersonating a voter, or even was intended to make that possible.

Because of its effectiveness, ACORN has been targeted for a variety of unfounded charges of voter registration fraud. Increasingly, reports of voter

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[11] *See* Brian Mellor, Voter Registration Quality Control (Project Vote).

[12] In two instances, temporary ACORN workers have pled guilty to creating false registration cards in order to appear to be registering voters when they were not. In one of those situations, ACORN's quality control review caught the false cards. Neither situation involved voter impersonation fraud. Keith Ervin, *Three Plead Guilty in Fake Voter Scheme*, SEATTLE TIMES, Oct. 30, 2007, at B5; Sam Hananel, *Schlozman Resigns From Justice Department Post*, ASSOCIATED PRESS, Aug. 24, 2007.

fraud have been used to generate support for restrictive voting laws which suppress voting by those groups expected to oppose incumbent candidates and parties. This can be seen at the federal level, where high-ranking officials such as Karl Rove have pronounced that voter fraud is an "enormous and growing" problem.[13] With cinematic flourish, Mr. Rove alleged that "in some parts of the country . . . elections [look] like those run in countries where the guys in charge are colonels in mirrored sunglasses."[14] These statements, which have no factual basis, undermine the public's trust in the integrity of elections and drum up support for unwarranted statutes like Indiana's Voter ID Law.

The political use of the voting enforcement process, contrary to the constitutional principles at stake in this case, has included a coordinated effort to spread restrictive statutes like the Indiana Voter ID Law. At the forefront of this effort were the American Center for Voting Rights and the American Center for Voting Rights Legislative Fund (together, "ACVR"), which claimed their mission was to protect the integrity of the election process. Founded in early 2005, AVCR appears to have ceased operations in May 2007, shortly after the press reported that experts hired by a federal study group found little polling place fraud.[15] Although

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[13] Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007.

[14] *Id.*

[15] *Id.* The AVCR website shut down at that time.

ACVR maintained it was non-partisan,[16] its leadership was closely tied to the Republican party.[17]

Purporting to describe alleged voter fraud, including incidents involving ACORN employees, ACVR has been a major source of the voter fraud myth. Yet ACVR's reports have amounted to little more than collages of unsubstantiated allegations,[18] many of which were proved false long before AVCR resurrected them. Despite its rampant inaccuracies, ACVR's disinformation campaign undermined faith in the electoral process and generated support for voter ID laws like Indiana's. Indeed, Indiana's Voter ID Law was adopted while ACVR was actively

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[16] An archived image of ACVR's website is available at http://web.archive.org/web/20050324112315/www.ac4vr.com/about/index.html.

[17] In his article, *The Scales of Justice*, NAT'L J., May 31, 2007, Murray Waas reported that ACVR was founded with the encouragement of Karl Rove and the White House. Mark (Thor) Hearne, who served as ACVR's counsel, was the national election counsel to the Bush-Cheney campaign in 2004 and a delegate to the Republican National Convention. Brian Lunde, ACVR's chairman, ran "Democrats for Bush" in 2004. Robin DeJarnette, ACVR's Executive Director, is the founder and Executive Director of the Virginia Conservative Action PAC.

[18] American Center for Voting Rights Legislative Fund, *Vote Fraud, Intimidation & Suppression in the 2004 Presidential Election* (Jul. 21, 2005) ("*ACVR National Report*"); American Center for Voting Rights, *Ohio Election Activities and Observations: Report to the United States House of Representatives Committee on House Administration* (Mar. 21, 2005) ("*ACVR Ohio Report*").

agitating for such laws,[19] and AVCR defended the statute in an *amicus* brief filed in the court below.

Attempts have also been made to misuse the U.S. Department of Justice ("DOJ") to perpetuate the voter fraud myth. The firings of two United States Attorneys, David Iglesias of New Mexico and John McKay of Washington, were connected to their refusals to prosecute baseless allegations of voter fraud.[20] Mr. Iglesias said that Republican Party officials repeatedly pushed him to prosecute ACORN workers.[21] Yet after reviewing more than 100 complaints of voter fraud, Mr. Iglesias found only one case that he could potentially prosecute; ultimately, he declined to prosecute that case because of "evidentiary problems."[22] In his view, the prosecution would have been based on "political grounds."[23] Nevertheless, an ACVR member pressured Mr. Igelisias several times to bring voter fraud prosecutions where little evidence existed; Mr.

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[19] Around the same time, other state legislatures, including Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, Virginia, and Washington, introduced photo ID legislation. Ryan Paul Haygood, *State Voter ID Bills Could Derail Civil Rights Successes*, SUN HERALD (Biloxi, MS), May 4, 2005, at C5.

[20] David C. Iglesias, *Why I Was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21; William Yardley, *Gonzales Bowed to Politics, a Former U.S. Attorney Says*, N.Y. TIMES, Mar. 21, 2007, at A16; Christopher Drew & Eric Lipton, *G.O.P. Anger in Swing State Eased Attorney's Exit*, N.Y. TIMES, Mar. 18, 2007, at 1.

[21] Michael Isikoff, *Rove: A Moving Target*, NEWSWEEK, Apr. 9, 2007, at 9.

[22] Iglesias, *supra* note 20.

[23] *Id.*

Igelsias described the ACVR official as "obsessed . . . [and] convinced there was massive voter fraud going on in [New Mexico]."[24]

Likewise, Mr. McKay, whose office reviewed every allegation of voter fraud in the 2004 Washington gubernatorial election, concluded that "that there was no evidence – . . . zero evidence – of election fraud in that election."[25] He said if he had been ordered to pursue criminal indictments for voter fraud, he would have resigned, because he refused to "drag innocent people in front of a grand jury."[26] Mr. McKay faced retaliation for his decision not to prosecute. When interviewed at the White House for a federal judgeship in August 2006, Mr. McKay was questioned about his "mishandling" of the 2004 governor's race.[27] He did not receive the appointment. Three weeks later his name appeared on a list of prosecutors to be dismissed.[28]

In a separate episode, the interim U.S. Attorney in Kansas City, Missouri, Bradley Schlozman, sought the indictment of ACORN workers for submitting false voter registrations just days before the 2006 election, but only after ACORN

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[24] Greg Gordon, *GOP Links to Vote-Fraud Push*, MIAMI HERALD, July 1, 2007, at A3.

[25] Pam Fessler, *Voter Fraud: A Tough Crime to Prove*, National Public Radio, Mar. 15, 2007.

[26] David Bowermaster, *McKay "Stunned" By Report on Bush*, SEATTLE TIMES, Mar. 13, 2007 at A9.

[27] Yardley, *supra* note 20.

[28] *Id.*

fired the workers and reported them to law enforcement officials.[29] Schlozman testified before the U.S. Senate that his superiors had "directed" him to bring the cases prior to the 2006 election.[30] A DOJ official later "clarified" that the decision to seek indictments shortly before an election was Schlozman's and not that of the DOJ staff.[31]

III. ACORN's Experiences, Like the Record in Indiana, Reflect No Systematic Voter Fraud.

The record below reveals no direct evidence of voter impersonation fraud in Indiana.[32] The court of appeals admitted that "not much" voter impersonation has been "found . . . in the states that have been studied" (which do not include Indiana).[33] In support of its empirical guess that voter impersonation fraud justifies deterring low-income citizens from voting, the court below was reduced to scavenging through the record for scraps of facts. That search yielded only "indirect evidence . . . provided by the discrepancy between the number of

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[29] Frank Morris, *Attorneys Scandal May Be Tied to Missouri Voting*, National Public Radio, May 3, 2007.

[30] Letter from Bradley J. Schlozman to Chairman Patrick J. Leahy (June 11, 2007), *available at* http://www.talkingpointsmemo.com/docs/schlozman-clarification/.

[31] Terry Frieden, *Justice Official Revises Testimony in Voter-Fraud Case*, CNN.COM, June 13, 2007.

[32] *See* Brennan Center for Justice at NYU School of Law, Brief of *Amicus Curiae* in Support of Petitioners.

[33] App. 8.

people listed on registered-voter rolls in [Indiana] and the substantially smaller number of people actually eligible to vote."[34]

ACORN's experience confirms that significant voter impersonation fraud is a damaging myth. Despite numerous investigations and lawsuits in Florida and Ohio, all stage-managed by political adversaries, ACORN has never confronted a well-founded allegation of voter impersonation fraud. No voter impersonation fraud has ever been prosecuted, all relevant civil complaints have been dismissed, and problematic voter registrations have been few.[35]

The pattern of these campaigns against voting is depressingly clear. Advocates of shrinking the franchise make headline-grabbing claims of voter fraud in the weeks leading up to close elections in battleground states like Florida and Ohio. Those accusations foster a misguided fear that the electoral process is tainted. Months and years later, the accusations are found groundless, but exonerations do not titillate, so the media either fails to report them or buries them in the back pages. No evidence has linked voter impersonation fraud to the few incorrect voter registrations which arise when millions of people register to vote.

A. Florida

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[34] *Id.* at 8-9.

[35] Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1.

In 2004, ACORN successfully supported a popular referendum to raise Florida's minimum wage. During the campaign, ACORN helped 210,700 Floridians register to vote, and in 2006, ACORN helped another 20,665 Florida citizens register. With the apparent goal of suppressing votes from the citizens served by ACORN, some political groups alleged voter registration fraud, which led to criminal investigations, civil litigation, and sensationalized media reports.

On October 21, 2004 – less than two weeks before election day – the Florida Department of Law Enforcement ("FDLE") announced that it had commenced investigations into alleged voting irregularities and that it intended to "combat . . . widespread efforts to commit voter fraud."[36] The FDLE took the highly unusual step of citing ACORN as "[o]ne of the groups whose workers have been connected with the widespread voter irregularities."[37] Fourteen months later – long after the voting was over – the FDLE found no evidence of illegal or fraudulent activity by ACORN.[38]

Two days before the FDLE announced its investigation, lawyers for a discharged ACORN

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[36] Press Release, Fla. Dep't of Law Enforcement, *FDLE Investigates Statewide Voter Fraud* (Oct. 21, 2004).

[37] *Id.*

[38] *Voter Fraud Lawsuits Against ACORN Dismissed*, MIAMI TIMES, Dec. 21, 2005, at 3A; Joni James, *Voter Fraud Charges Collapse*, ST. PETERSBURG TIMES, Dec. 15, 2005, at 1B. The FDLE subpoenaed ACORN on April 15, 2005, seeking employment documents from forty-four employees.

employee, Mac Stuart, filed a whistleblower lawsuit against ACORN.[39] The complaint accused ACORN of numerous illegal practices, including paying workers for each voter registration card collected and failing to deliver the registration cards of people who designated "Republican" as their party affiliation.[40] ACORN denied the charges and countersued for slander and libel.[41] A year later – again, long after the election – Mr. Stuart's attorneys sought permission to withdraw as counsel.[42] On December 6, 2005, the court dismissed Mr. Stuart's case with prejudice and found in favor of ACORN on its counterclaim for defamation.[43] The damage, however, had been done: five months before dismissal, ACVR's report prominently featured Mr. Stuart's case as one of the "top voter fraud registration incidents involving ACORN."[44]

On October 29, 2004 (four days before the election), the same law firm that represented Mr.

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[39] Compl. and Demand for Jury Trial, *Stuart v. Assoc. of Cmty. Orgs. for Reform Now*, No. 04-22074 (Fla. Cir. Ct. Oct. 19, 2004).

[40] *Id.*

[41] Def.'s Answer, Affirmative Defenses and Countercl., *Stuart v. Assoc. of Cmty. Orgs. for Reform Now*, No. 04-22764 (S.D. Fla. Nov. 1, 2004).

[42] Pl.'s Mot. to Withdraw as Counsel, *Stuart*, No. 04-22764 (S.D. Fla. Nov. 1, 2005).

[43] Final Order of Dismissal with Prejudice and J. in Favor of ACORN, *Stuart*, No. 04-22764 (S.D. Fla. Dec. 6, 2005).

[44] *ACVR National Report*, *supra* note 18, at 41.

Stuart filed another suit against ACORN.[45] The plaintiffs were twelve Floridians who claimed that ACORN obstructed their voting rights by failing to submit registration applications to Florida's election supervisors.[46] Within fourteen months, all of the plaintiffs had abandoned the lawsuit.[47]

Other allegations made against ACORN workers in Florida turned out to involve errors or problematic registration applications that ACORN's quality control process had filtered out.[48] The U.S. Attorney in Miami concluded that many vote

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[45] Def.'s Notice of Removal, *Rousseau v. Assoc. of Cmty. Orgs. for Reform Now*, No. 04-61636 (S.D. Fla. Dec. 9, 2004).

[46] *Id.*

[47] Two plaintiffs had cast provisional ballots so could not prove that their votes were uncounted, while one was a convicted felon and therefore could not vote under Florida law. *See* Def.'s Mot. for Summ. J, *Rousseau*, No. 04-61636 (S.D. Fla. Nov. 1, 2005). On November 23, 2005, the court dismissed the case at the parties' request. *See* Final Order of Dismissal with Prejudice as to Specified Pls., *Rousseau*, No. 04-61636 (S.D. Fla. Oct. 14, 2005); Final Order of Dismissal, *Rousseau*, No. 04-61636 (S.D. Fla. Nov. 23, 2005).

[48] For example, the press reported, and ACVR highlighted, that an ACORN employee incorrectly registered former St. Petersburg Mayor Charles Schuh, a 68-year-old Democrat, as a 30-year-old female Republican. An ACORN supervisor had identified the error by calling Mayor Schuh's home, and after correcting the error with the elections office, the Mayor voted without incident. *ACVR National Report*, *supra* note 18, at 42; Tom Zucco, *Signup Mistakes Blamed on Group*, ST. PETERSBURG TIMES, Oct. 4, 2004, at 1B.

irregularities were inadvertent mistakes made by immigrants.[49]

The multi-pronged attack on the integrity of the election system fed the public's apprehension about voter fraud. Six months after the FDLE's investigation closed, ACORN's opponents continued to refer to the FDLE's statements as indicating ACORN's "pattern and practice" of voter fraud.[50] Yet there was none, and certainly no evidence of voter impersonation fraud.

B. Ohio

Ohio figured prominently as a "battleground" state in the 2004 presidential election. ACORN's successful efforts to register Ohioans to vote (189,250 in 2004 and 120,751 in 2006) triggered a barrage of false allegations of voter fraud.

Less than a week before election day, two Ohio residents sued ACORN and others under Ohio's Racketeer Influenced and Corrupt Organizations

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[49] Lipton & Urbina, *supra* note 35. The consequences of such mistakes can be severe: a ten-year resident of Florida was deported to Pakistan for improperly filling out a voter-registration card while renewing his driver's license. *Id.* A recent report concluded that many of the eighty-six people convicted of voter fraud in the past five years by the DOJ appear to have mistakenly filled out registration forms or misunderstood eligibility rules and lacked criminal intent. *Id.*

[50] *See* Employment Policies Institute, *Rotten ACORN: America's Bad Seed*, at 18-19 (July 2006).

Act, for "diluting" their voting rights.[51] They sought treble damages plus attorneys' fees and costs, claiming that "fraudulent voter registration . . . has reached epidemic proportions."[52] Before the first amended complaint was filed, the Free Enterprise Coalition (an organization linked to ACVR) agreed to pay the plaintiffs' legal fees.[53] A year later, the plaintiffs unilaterally withdrew their action[54] but not before ACVR featured the suit in its Ohio report as still more false evidence of "rampant registration fraud."[55]

Federal, state, and local investigators in Ohio also alleged voter fraud against ACORN. ACVR sent

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[51] Compl. and Jury Demand, *Rubick v. America Coming Together*, No. 04 CV 650 (Court of Common Pleas, Woof County, Ohio, Oct. 29, 2004); First Amended Compl., *Rubick*, No. 04 CV 650 (Court of Common Pleas, Woof County, Ohio, Dec. 17, 2004). Because RICO violations carry high penalties, including treble damages, RICO claims are sometimes used to chill legitimate activities. *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 265 (1994) (Souter, J., concurring) (noting that "RICO actions could deter protected advocacy").

[52] First Amended Complaint, at 6, *Rubick*, No. 04 CV 650.

[53] *See* Letter from Mark Rubick to Douglas Haynam (Oct. 26, 2004); Letter from Jamey Koralewski to Douglas Haynam (Oct. 26, 2004). Alex Vogel, an authorized representative of the Free Enterprise Coalition, signed the letters. He also served on ACVR's initial board of directors. Additionally, Mr. Vogel has worked in several branches of the Republican party, including the Republican National Committee and the National Republican Senatorial Committee.

[54] Notice of Dismissal Without Prejudice, *Rubick*, No. 04 CV 650 (Court of Common Pleas, Woof County, Ohio, Oct. 31, 2005).

[55] *ACVR Ohio Report*, *supra* note 18, at 12.

a letter to the DOJ claiming "serious violation of federal law" by ACORN in Ohio,[56] while press reports announced that election boards throughout the state received hundreds of fraudulent voter registrations.[57] ACORN cooperated with investigators, producing thousands of documents in response to subpoenas. A year later the U.S. Attorney's Office in Cleveland closed its investigation without filing any charges.[58]

Most allegations directed at ACORN in Ohio were simply false. In Franklin County, for example, ACVR alleged that "ACORN Registrations Include[d] . . . [a] Suspected Terrorist," Nuradin Abdi, but the Franklin County Elections Director said that Abdi's 1999 voter registration appears to have been taken by the Ohio Bureau of Motor Vehicles, not by ACORN workers.[59]

A few allegations in Ohio concerned isolated incidents of incorrectly completed registration cards. For example, the Director of the Franklin County Board of Elections ("BOE") informed ACORN of two

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[56] *ACVR Refers Ohio Voter Fraud Report to Department of Justice*, PR NEWSWIRE, Mar. 24, 2005.

[57] *See, e.g.*, WBNS-TV, *Election Fraud Cases Under Review*, Oct. 22, 2004; *Voter Registration Investigation One of Largest in Recent Years*, ASSOCIATED PRESS, Sept. 23, 2004.

[58] Lisa A. Abraham, *Voter Fraud Investigation Nets 1 Arrest*, BEACON J., Nov. 8, 2005.

[59] *AVCR Ohio Report*, *supra* note 18, at 60; Jon Craig, *Magazine Inaccurately Uses "Dispatch" Material in Story*, COLUMBUS DISPATCH, Oct. 26, 2004, at 4B.

false registration forms submitted by ACORN.[60] ACORN dismissed the two responsible workers before the BOE reported the incident to the press.[61] In Hamilton County, of over 68,000 new registration cards submitted, nineteen turned out to be incorrect.[62] With no evidence of voter impersonation fraud, such isolated errors are a far cry from the "significant problem"[63] described by ACVR or by the state of Indiana in this case.

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[60] *ACVR National Report*, *supra* note 18, at 60.

[61] Robert Vitale, *Two Fired Over Bogus Voter-Registration Forms*, COLUMBUS DISPATCH, June 3, 2004, at 4D; Robert Vitale, *Made-Up People*, COLUMBUS DISPATCH, June 2, 2004, at 1A. Subsequently, ACORN implemented a new computer system to verify the accuracy of registration cards.

[62] Cindi Andrews, *Alleged Fraudulent Voter Cards Scrutinized*, CINCINNATI ENQUIRER, Oct. 8, 2004, at 1C; *ACVR National Report*, *supra* note 18, at 60.

[63] *Id.* at 8.

CONCLUSION

For the foregoing reasons and those explained in the briefs of petitioners and their supporting *amici,* this Court should conclude that the Indiana Voter ID Law cannot be justified on the basis of the Indiana legislature's empirical guess that voter impersonation fraud occurs.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,

Petitioners,

v.

TODD ROKITA, *ET AL.*,

Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE THE BRENNAN CENTER FOR JUSTICE; DEMOS: A NETWORK FOR IDEAS & ACTION; LORRAINE C. MINNITE; PROJECT VOTE; AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF PETITIONERS

[PHOTO ID LAW LACKS JUSTIFICATION]

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INTEREST OF THE AMICI[1]

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting Rights and Elections project, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it, tracking the national experience with legislation relating to election fraud, co-authoring three major reports on the subject,[2] and

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[1] Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution to its preparation or submission. The parties have filed letters consenting to the filing of any amicus curiae brief with the Clerk of the Court.

[2] *See* Justin Levitt, *The Truth About Voter Fraud* (Oct. 2007), http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf ("*Truth About Voter Fraud*"); Brennan Center & Michael McDonald, *Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General* (Dec. 2005), http://www.brennancenter.org/dynamic/subpages/download_file_35010.pdf; Brennan Center & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005), *available at*

participating as counsel or amicus in a number of federal and state cases involving voting and election issues. The Brennan Center has participated as amicus in constitutional challenges to statutes requiring photo identification ("photo ID") as a condition for in-person voting in Georgia and Albuquerque, New Mexico, as well as before the court of appeals in this case.

Demos: A Network for Ideas & Action ("Demos") is a non-partisan public policy research and advocacy center. Its Democracy Program focuses on removing barriers to political participation, especially those affecting traditionally disfranchised populations such as communities of color and low-income citizens. In 2003 Demos published a report by Lorraine C. Minnite and David Callahan entitled *Securing the Vote: An Analysis of Election Fraud* (updated most recently in September 2007) that is widely recognized as the most comprehensive survey available of the extent of voter fraud in U.S. elections.

Lorraine C. Minnite is an assistant professor in the Department of Political Science, Barnard College, Columbia University in New York City. She has written and provided testimony on the incidence of fraud in elections, and is currently finishing a book on the subject. She is co-author of the voter fraud study published by amicus Demos, referred to above, and cited by the district court in this case.

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http://www.brennancenter.org/dynamic/subpages/download_file_47903.pdf.

Project Vote is a non-partisan, non-profit organization dedicated to voter participation in the election process. It assists low-income, minority citizens to register to vote. It has a strong interest in ensuring that the individuals it registers are able to vote and has actively worked to reduce barriers eligible voters face when attempting to register and vote.

People for the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. It has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the voting rights of all eligible citizens. PFAWF regularly participates in civil rights litigation, and has participated in litigation to protect the right to vote and prevent the disenfranchisement that occurs when restrictive voter ID laws are enforced.

SUMMARY OF THE ARGUMENT

The district court and court of appeals, while acknowledging that Indiana had no record of voter impersonation fraud at the polls, erroneously relied upon unfounded assertions about the existence of such voter impersonation fraud elsewhere in the nation as a basis to uphold Indiana's photo ID requirement. In this brief, amici examine the reports relied on by the district court and the court of appeals, as well as nationwide studies of voter fraud. We show that, in fact, there is no more evidence that polling-place impersonation fraud is a problem outside Indiana than there is in Indiana.

Prior to its enactment of the photo ID law, Indiana already had in place less onerous and more appropriately tailored identification methods, as well as severe criminal penalties to deter impersonation fraud. Moreover, forty-eight states, the District of Columbia and the federal government currently use identification methods that provide less onerous alternatives to photo identification. Absent evidence that polling-place impersonation fraud is a problem in Indiana or anywhere else, Indiana cannot show that there was any need to impose the additional burdens of a photo ID requirement to prevent such fraud.

As the court of appeals acknowledged, a photo ID requirement imposes burdens mainly on Indiana's most disadvantaged citizens—people "low on the economic ladder"[3]—who make up most of the citizens who do not already possess a driver's license or other acceptable photo identification, and at least some of whom, the court of appeals notes, will be deterred from voting by these burdens.[4] As the court also acknowledged, voters in this demographic group "are more likely to vote for Democratic than Republican candidates."[5] Hence, careful scrutiny of Indiana's asserted interest was needed to ensure that the photo ID requirement is not simply the latest device in a

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[3] *Crawford* v. *Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

[4] *Id.*

[5] *Id.*

long history of voting requirements aimed at suppressing the vote of politically weak or voiceless minorities and a pretext for obtaining a partisan electoral benefit.

The district court and court of appeals failed to provide anything approaching careful scrutiny—whether denominated "strict" or "heightened"—to Indiana's claimed need to require photo ID to prevent impersonation fraud. Instead, they relied on documents that in fact refute the existence of impersonation fraud; unconfirmed hearsay reports that have been discredited by formal investigations; unsupported speculation; and supposed "perceptions" and fear of voter fraud that are unsupported by any evidence and that are easily manipulated. Under our constitutional system the fundamental right to vote cannot be taken away by unfounded "perceptions" of a majority, whether measured by vote or by opinion poll.

As Judge Wood observed in dissenting from the court of appeals' denial of *en banc* rehearing, "the 'facts' asserted by the state in support of its voter fraud justification were taken as true without examination to see if they reflected reality."[6]

This brief shows that in reality, polling-place impersonation fraud is not a problem and that a photo ID requirement is not needed to prevent it.

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[6] *Crawford* v. *Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (*en banc*) (Wood, J., dissenting from denial of *en banc* reconsideration).

ARGUMENT

INDIANA'S PHOTO ID REQUIREMENT IS AN UNNECESSARY RESPONSE TO THE EXTREMELY UNLIKELY AND UNSUBSTANTIATED THREAT OF POLLING-PLACE IMPERSONATION FRAUD

Burdick v. *Takushi*, 504 U.S. 428 (1992), requires that, in assessing the constitutionality of election regulations, courts must balance "the character and magnitude" of the burdens on plaintiffs' voting rights "against the *precise interests* put forward by the State" and "the extent to which those interests make it *necessary* to burden the plaintiffs' rights." 504 U.S. at 434 (quotation marks and citation omitted) (emphasis added). Election laws that impose severe burdens on voters are subjected to strict scrutiny. *See id.* But even when a law's burdens are less than severe, *Burdick* does not contemplate application of the deferential "rational basis" test applicable to social and economic legislation.[7] Rather, in such circumstances, *Burdick*

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[7] *See, e.g.*, *Reform Party of Allegheny County* v. *Allegheny County Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (*en banc*) (election laws imposing less than severe burdens are analyzed under an "intermediate level of scrutiny"); *McLaughlin* v. *N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) ("a regulation which imposes only moderate burdens could well fail the [*Burdick*] balancing test when the interests that it serves are minor, notwithstanding that the

requires the state to demonstrate an "important regulatory interest" and that regulations addressing this interest are "reasonable" and "nondiscriminatory." 504 U.S. at 434.[4]

States, of course, have "a compelling interest in preventing voter fraud." *Purcell* v. *Gonzalez*, 127 S. Ct. 5, 6-7 (2006). But the broad concept of voter fraud is not the "precise interest" that *Burdick* requires be evaluated here. A photo identification requirement addresses only one type of alleged voter fraud: the impersonation of a registered voter at the polls. It is not a remedy for absentee ballot fraud, ballot tampering, voting from two addresses, vote buying or other voter fraud. This critical distinction was repeatedly ignored by the courts below. Moreover, because Indiana already had voter identification methods in place before it enacted the photo ID requirement in 2005, the issue is whether Indiana's interest in preventing polling-place impersonation

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regulation is rational"); *New Alliance Party* v. *Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) ("Although . . . the burden imposed . . . is not insurmountable, . . . plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed.").

[4] For this reason, the district court's use of the deferential test of *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955), to evaluate the Indiana voter ID law was error. *See Indiana Democratic Party* v. *Rokita*, 458 F. Supp. 2d 775, 829 (S.D. Ind. 2006).

fraud justified replacing those earlier methods with a more stringent identification requirement that increases the burdens especially for eligible voters who currently lack a photo ID and must obtain one to vote.

The circumstances here warrant careful examination of that interest. Absent evidence that Indiana's prior identification methods were insufficient to prevent polling-place impersonation fraud, and that it was therefore "necessary" to place additional burdens on voters, the interest advanced by Indiana is suspect. As the court of appeals recognized, the burdens of the photo ID requirement fall mainly on low-income citizens who are the most likely to lack such IDs. *See Crawford*, 472 F.3d at 951. And as the court of appeals also acknowledged, the photo ID requirement will discourage at least some of those people from voting. *Id.* This disparate impact on the voting rights of low-income citizens—a group that is disproportionately made up of people of color[9]—increases the need for caution. *See Vieth* v.

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[9] *See, e.g.*, Matt A. Barreto, *et al.*, *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters*, 2007 American Political Science Ass'n Annual Conference 1 (Sept. 1, 2007) (on file with the author) ("immigrant and minority voters were consistently less likely to have each form of identification" required under voter ID laws); M.V. Hood & Charles S. Bullock, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute* 19 (April 2007), http://electionlawblog.org/

Jubelirer, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring) (when laws threaten to exclude minority groups from the political process, courts should "err on the side of caution"); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (heightened scrutiny is appropriate when laws distinctly burden "discrete and insular" minority groups that lack sufficient numbers or power to seek redress through the political process).

Moreover, as the court of appeals acknowledged, a significant majority of such low income citizens vote Democratic. *See Crawford*, 472 F.3d at 951. In such circumstances, "applying heightened scrutiny helps to ensure that . . .

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archives/GA%20Voter%20ID%20%28Bullock%20%26%20Hood%29.pdf ("Registered voters are significantly less likely to possess a driver's license if they are from minority groups, especially blacks and Hispanics, and if they are older."); John Pawasarat, *The Drivers License Status of the Voting Age Population in Wisconsin*, University of Wisconsin—Miwaukee (2005), http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (noting that "[l]ess than half (47 percent) of Milwaukee County African American adults and 43 percent of Hispanic adults have a valid drivers license compared to 85 percent of white adults"; that "only 26 percent of African Americans and 34 percent of Hispanics [have] a valid license compared to 71 percent of young white adults"; and that "23 percent of persons aged 65 and over do not have a . . . drivers license or a photo ID").

[electoral] limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Clingman* v. *Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment).[10]

Careful scrutiny of Indiana's asserted interest shows that polling-place impersonation fraud is not a

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[10] Neither *Timmons* v. *Twin Cities New Party*, 520 U.S. 351 (1997), nor *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986), supports a different conclusion. *Timmons* held that "elaborate, empirical evidence of the weightiness of a state's interest" was not needed to justify a ballot-access restriction that "did not restrict the right of a [party] or its members to vote for anyone they like." 520 U.S. at 363, 364. But here Indiana provides *no* empirical justification for a law that *does* directly restrict the right to vote of its most disadvantaged citizens. *Munro* sustained a ballot-access restriction, despite no evidence that it addressed an existing problem, because "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, *provided that the response is reasonable and does not impinge on constitutionally protected rights*." 479 U.S. at 195-96 (emphasis added). Indiana's law does "impinge on constitutionally protected rights" and, as we show, is not reasonable because less burdensome laws have proven adequate to prevent polling-place impersonation fraud.

problem and that Indiana's photo ID requirement is not needed to prevent it.

A. Polling-Place Impersonation Fraud Is Highly Unlikely And Exceedingly Rare

The record contains no evidence of polling-place impersonation fraud in Indiana: the State conceded that it was unaware of any incidents of attempted or successful impersonation fraud in Indiana; that no one in Indiana history has been indicted for impersonation fraud; and that no evidence of impersonation fraud was presented to the Indiana legislature during the debate over the photo ID law. *See Rokita*, 458 F. Supp. 2d at 792-93.

Without citing a single fact, the court of appeals nevertheless concluded that the "notorious examples of Florida and Illinois," as well as Michigan, Missouri and Washington State, provide evidence—"though not much"—that polling-place voter impersonation is a problem and that it is no less likely to occur in Indiana. *Crawford*, 472 F.3d at 954. But the record, in fact, demonstrates that such fraud is not a problem in the states listed by the court of appeals or anywhere else in the United States.

1. None of the Examples Cited by the Court of Appeals Indicates That Polling-Place Impersonation Fraud Is a Genuine Problem

FLORIDA: The court of appeals never explains why Florida is a "notorious" example.

Perhaps this refers to Florida's problems in the 2000 Presidential election. But those problems had nothing to do with impersonation fraud: Florida was "notorious," among other things, for poor ballot design, antiquated election machinery, and the exclusion of eligible voters from the registration rolls.

There are only two references to Florida in the record. The first is an article from the Miami Herald discussing extensive problems with absentee ballot fraud, vote buying, and voting by ineligible non-residents in a 1997 Miami election. The only suggestions of impersonation fraud in the article are statements by voters confronted with allegations that they voted in districts where they did not reside, and who responded by saying someone must have voted in their names. The article offers no suggestion that these unconfirmed allegations of impersonation involved polling-place impersonation, rather than absentee ballot fraud or clerical errors. *See Rokita*, 458 F. Supp. 2d at 826 & n.78 (citing, *inter alia*, State's Ex. 10 (R. 83, Att. 2)). Tellingly, this 1997 election was overturned on the basis of absentee ballot fraud, without any reference to polling-place impersonation. *In re the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So. 2d 1170, 1172 (Fla. Dist. Ct. App. 1998).

The second reference to Florida is a citation to a study by Lorraine C. Minnite and David Callahan entitled *Securing the Vote: An Analysis of Election Fraud* (2003) ("2003 Minnite Study"). *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 6 (R. 82, Att. 3)). This study contains no reference to polling-place

impersonation fraud in Florida; it discusses absentee ballot fraud in Miami's 1997 mayoral primary and refers to Florida's massive disenfranchisement of eligible, mostly African-American voters in the 2000 Presidential election whose names were erroneously put on felony lists. *See id.* at 39-40.

ILLINOIS: The court of appeals never explains why Illinois is "notorious." The only item in the record concerning Illinois is a 1982 newspaper article describing allegations of fraud in the 1982 gubernatorial election. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 13 (R. 83, Att. 5)). The article's main focus is absentee ballot fraud and ballot tampering by election officials. While this article from a quarter of a century ago refers to allegations of voting in Chicago in the name of deceased persons—so-called "ghost voting"—the article gives no specific examples of any ghost votes and does not indicate whether the unproven allegations involved in-person, rather than absentee voting, or are a reflection of clerical errors. (*See* the discussion of Michigan, immediately below.)

MICHIGAN: There is nothing in the record or the district court's opinion about any election fraud in Michigan. There were reports of voting irregularities in Michigan in 2004 (not reflected in the record), but these reports indicate the unreliability of reports of impersonation fraud. They include allegations of 132 votes allegedly cast by dead people. However, a follow-up investigation to the initial report indicated that all of these votes involved absentee ballots, 124 of the 132 incidents were incorrectly reported, and no ballots were actually cast by a deceased voter after

the voter had died. *See* Kelly Chesney, *Special Letter: Claims That the "Dead" Voted Were Wrong*, Detroit News, Mar. 5, 2006. Moreover, it appears that in Michigan, as elsewhere, claims of ghost voting are often the result of clerical errors, as when election clerks mistakenly record a vote under the wrong name in post-election record keeping, or have a voter sign the poll book entry of a voter with a similar name. *See* Lisa Collins, *In Michigan, Even Dead Vote*, Detroit News, Feb. 26, 2006 ("It's impossible to say whether [purported cases of ghost voting] are names used by someone else to cast fraudulent votes or whether they simply represent clerical errors . . . . Among the most common mistakes occur when election workers record a vote under a similar name, or confuse voters with their parents or other relatives."); *see also* Van Smith, *Election Nights of the Living Dead*, Baltimore City Paper, June 22, 2005 (discussing likely mistakes involving, *e.g.*, voters with different middle initials and a son confused with his deceased father of the same name).[11]

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[11] That publicized cases of alleged impersonation fraud often prove baseless upon investigation is illustrated by the district court's reliance on reports of ghost voting in Georgia. *See Rokita*, 458 F. Supp. 2d at 493 (citing State Ex. 12 (R. 83, Att. 4)). The newspaper article relied on by the district court recounted lurid tales of ballots cast from the grave, including a vote by one Alan Jay Mandel. Further investigation revealed no fire behind the smoke, however: the Georgia Secretary of State determined, in fact, that the votes attributed to

MISSOURI: The district court cited stories concerning voter fraud in Missouri. *See, e.g.*, *Rokita*, 458 F. Supp. 2d 794 (citing State Ex. 13 (R. 83, Att. 5)). None of the sources cited by the district court, however, points to any evidence that the alleged impersonation fraud in Missouri was accomplished *in-person* rather than absentee. *See* John Fund, *Stealing Elections* 64 (2004) (State Ex. 2 (R. 79, Att. 1)); 2003 Minnite Study at 43 (State Ex. 6 (R. 82, Att. 3)); Statement of Sen. Kit Bond (State Ex. 7 (R. 82, Att. 4)). Moreover, these allegations were part of a litany of claims of widespread voter fraud in the 2000 election in St. Louis that since have been shown to be almost entirely specious. According to the 2003 Minnite Study, the Missouri Secretary of State's investigation and an investigation by the St. Louis Post Dispatch disclosed such massive errors in official records and so many wrongful accusations of fraud that the "alleged voter fraud scandal in St. Louis

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Mr. *Mandel* had actually been cast by one Alan Jay *Mandell*, who was alive and well. As the Secretary stated, "a subsequent check of the records by Fulton County staff revealed that the media account was erroneous." Secretary of State Cathy Cox, *The 2000 Election: A Wake-Up Call for Reform and Change* 11 n.3 (Jan. 2001), http://www.sos.state.ga.us/acrobat/elections/2000_election_report.pdf; *see also* Greg Palast, *The Wrong Way to Fix the Vote*, Wash. Post, June 10, 2001; *Common Cause/Georgia* v. *Billups*, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005) (noting absence of evidence of polling-place impersonation fraud in Georgia).

looks more like a case of managerial ineptitude and under-funding, and poor implementation of the [National Voter Registration Act] [by] St. Louis and Missouri election officials." 2003 Minnite Study at 42-43. This conclusion was later dramatically confirmed. After completion of an F.B.I. investigation, the Department of Justice issued no indictments for voter fraud of any kind. Instead, "[t]he Justice Department threatened the Board [of Elections] with a lawsuit for abusing the voting rights of thousands of eligible St. Louis voters by illegally purging their registration records in violation of the National Voter Registration Act. It was these illegal purges that created . . . the appearance of election irregularities." Lorraine C. Minnite, *An Analysis of Voter Fraud in the U.S.* 16 (2007), http://www.demos.org/pubs/analysis_voter_fraud.pdf; *see also Truth About Voter Fraud* at 24-26.

Most recently, the Supreme Court of Missouri, in striking down a photo ID law under the state constitution, quoted with approval the findings of the trial court that:

> No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicates that voter impersonation fraud is not a problem in Missouri.

Weinschenk v. *State of Missouri*, 203 S.W. 3d 201, 217 (Mo. 2006); *see also United States* v. *Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *10 (W.D. Mo.

Apr. 13, 2007) (noting that the United States had not "shown that any voter fraud has occurred" in Missouri in action alleging violations of National Voter Registration Act).

The Missouri Supreme Court concluded that the "[p]hoto ID requirement could only prevent a particular type of fraud that does not occur in Missouri." *Weinschenk*, 203 S.W. 3d at 218.

WASHINGTON STATE: A comprehensive investigation of alleged voter fraud was conducted in Washington State after the bitterly contested 2004 gubernatorial election. *See Rokita*, 458 F. Supp. 2d at 793, 826 (citing State Ex. 3 (R. 79, Att. 2)); *Borders* v. *King County*, No. 05-2-00027-3 (Wash. Super. Ct. 2005), *reprinted in* 4 Election L.J. 418 (2005). But this investigation refutes—rather than supports—claims that polling-place impersonation fraud is a problem. Out of 2,812,675 ballots cast, the investigation uncovered only 19 incidents that could conceivably have involved impersonation fraud, involving alleged voting in the name of the deceased. *Id.* at 420, 423. Subsequent investigations indicated that most of these ghost voting incidents involved absentee ballots—not polling-place impersonation fraud—and therefore would not have been prevented by a photo ID requirement. *See* Phuong Cat Le & Michelle Nicolosi, *Dead Voted in Governor's Race*, Seattle Post-Intelligencer, Jan. 7, 2005 (noting that only one of eight investigated cases of ghost voting involved a voter actually voting at the polls, while the other seven cases involved absentee ballots). A

county official stated that the cases being investigated were "not indications of fraud." *Id.*[12] Furthermore, even if one or two ghost voting incidents did involve polling-place impersonation fraud, such incidents can be prevented by each State updating its voter rolls on a regular basis as required by federal law.[13] Another article cited by the district court indicates that election officials in Washington had not yet regularly updated the voter rolls by 2004. *See Rokita*, 458 F. Supp. 2d at 826 n.78 (citing State Ex. 15 (R. 83, Att. 7)).

2. *The Additional Evidence Cited by the District Court and Other Studies Show That Polling-Place Impersonation Fraud Is Not A Genuine Problem*

The additional evidence relied on by the district court and other studies also show that polling-place impersonation fraud is not a problem anywhere in the nation.

MINNITE STUDY: The district court's reliance on the 2003 Minnite Study is puzzling. *See*

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[12] As noted, claims of in-person impersonation fraud are frequently shown to merely reflect clerical errors and poor record keeping. *See supra* at 12.

[13] Under the Help America Vote Act of 2002 ("HAVA"), states are required to implement centralized registration lists, update them regularly, and remove ineligible registrants. *See* 42 U.S.C. § 15483(a)(4).

Rokita, 458 F. Supp. 2d at 793-94 (citing State Ex. 6 (R. 82, Att. 3) (2003 Minnite Study)). That study is one of the most comprehensive studies of voter fraud allegations to date,[14] but it compels a conclusion exactly opposite to that reached by the district court. The study found that voter fraud of any kind is "very rare," is not more than a "minor problem" and "rarely affects election outcomes." 2003 Minnite Study at 4, 17. Notably absent from the study is any evidence of polling-place impersonation fraud. According to the study, even where election fraud allegations have received significant attention in the news media, the allegations almost invariably proved baseless. *Id.* at 17, 40-43.

To the limited extent fraud has been detected, the study concludes, it generally takes the form of organized fraud such as vote buying, use of fraudulent absentee or mail-in ballots, ballot box stuffing, or wrongful purging of registration rolls to exclude eligible voters. *Id.* at 14-15. Instances of these types of fraud far outweigh incidents of individual fraud. *Id.* Most importantly, the study concludes that the wrongful *disenfranchisement of voters* is a "far bigger problem" than voter fraud. *Id.* at 15.

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[14] In the study, Minnite and Callahan reviewed news and legal databases and interviewed attorneys general and secretaries of state in 12 states, representing about half of the national electorate, about incidences of election fraud from 1992 to 2002.

DOJ REPORT: The district court also mistakenly relied on a Department of Justice ("DOJ") report on voting fraud. *See Rokita*, 458 F. Supp. 2d at 793 (citing State Ex. 2 (R. 79, Att. 1)). The report does not contain a single reference to impersonation fraud. An updated version of that report, which describes DOJ's investigation of election fraud since 2002, confirms that impersonation fraud is not a threat to the integrity of elections. *See* Press Release, DOJ, *Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative* (July 26, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html ("DOJ Report").[15] The DOJ Report describes 86 convictions for election-related misconduct over a nearly five-year period, but not a single one of these convictions involved impersonation fraud. *See id.*; *see also* Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 12, 2007. The report describes incidents of vote buying, improper use of personal information by local officials, various campaign finance convictions, and harassment to keep voters from the polls. None of these crimes could be prevented by requiring voters to show a photo ID.

WISCONSIN: The district court cited a year-long joint federal and state investigation into an alleged scheme to alter the result of the 2004 election

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[15] *See also* DOJ, *Election Fraud Prosecutions & Convictions*, Oct. 2002 — Sept. 2005, *available at* http://www.truthaboutfraud.org/pdf/doj%20election%20fraud%20prosecutions.pdf.

in Wisconsin, but this investigation also disclosed no evidence of impersonation fraud. *See Rokita*, 458 F. Supp. 2d at 793-94 (citing State Ex. 4 (R. 79, Att. 3) (*Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* (May 10, 2005), *available at* http://www.wispolitics.com/1006/election fraud.pdf)). Indeed, the investigation showed very little evidence of any other type of voter fraud, although it did turn up severe administrative and record keeping problems with the Milwaukee elections board. *See id.* at 1; *see also* Greg Borowski, *A New Push To Repair Elections*, Milwaukee Journal-Sentinel, May 15, 2005 (administrative problems and "jumbled records made confirmation [of voter fraud allegations] a near impossibility"). The few incidents that were substantiated involved registration fraud, double voting and voting by ineligible persons with felony convictions, not impersonation fraud at the polls. *See* Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 5, 2005.

SABATO AND FUND: The district court cited two books discussing allegations of voter fraud generally, *see Rokita*, 458 F. Supp. 2d at 793-94 (*citing* Sabato & Simpson, *Dirty Little Secrets* 292 (1996) ("Sabato"); Fund, *Stealing Elections* 64 (2004) ("Fund")), but these books contain few allegations of voting irregularities that could even conceivably have been remedied by a photo ID requirement. Sabato, for example, describes thousands of incidents of possible absentee ballot fraud and numerous problems plaguing California's registration rolls. Sabato at 291-92. But it cites only a single hearsay allegation of attempted polling-place impersonation

fraud—and that was foiled without a photo ID requirement. *Id.* at 292.

Likewise, Fund retails numerous reports of voting by ineligible persons with felony convictions and double voting—problems for which requiring a photo ID is no solution. Fund at 64.[16] And, as noted, *see supra* at 13, though Fund parrots allegations of alleged voting in the name of deceased persons in Missouri, he offers no evidence that any of these involved in-person, rather than absentee, voting or that they were not the result of clerical errors. Fund at 64. Moreover, allegations of impersonation fraud in Missouri have been thoroughly discredited. *See supra* at 13.

CARTER-BAKER COMMISSION: The district court also relied on the report of the Carter-Baker Commission on Federal Election Reform[17] for the proposition that impersonation fraud occurs, and that photo ID requirements are necessary to prevent it. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 1 (R. 82, Att. 1) (Commission on Federal Election

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[16] A review characterizes Fund's book as filled with "distortions and half truths" and provides a point-by-point refutation of many of Fund's claims. *See* Media Matters, *John Fund's Book on Voter Fraud Is a Fraud* (Oct. 31, 2004), http://mediamatters.org/items/printable/20041101000

[17] The Carter-Baker Commission was not a commission of the federal government; it was an independent project organized by American University.

Reform, *Building Confidence in U.S. Elections* (Sept. 2005) ("Carter-Baker Report"))). The Commission cites no credible evidence of impersonation fraud, instead simply referring to the since-discredited reports of such fraud in Milwaukee and Washington State. *Compare* Carter-Baker Report at 2-4, 18 *with supra* at 14-15, 17-18. Moreover, as one of the dissenters notes, the Commission "did not call as witnesses many of the most established experts on the issue [of voter ID requirements]. A commission's reliance on anecdotes and political sound bites—rather than empirical data, testimony by top experts, and rigorous analysis—undermines its credibility." Spencer Overton, *Establishing Procedures for Credible Advisory Commissions* (2005), http://www.carterbakerdissent.com/procedure.php.[16]

Finally, reliance on the Carter-Baker Report for support of Indiana's photo ID law is misplaced: the Commission's co-chairs, President Carter and

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[16] Deficiencies are found in every other article and report cited by the district court. *See Rokita*, 458 F. Supp. 2d at 793-94 (citing State Exs. 2-18 (R. 79; R. 82, R. 83)); *id.* at 826 (citing State Exs. 3-18). Many are newspaper reports of "double voting" by voters at multiple addresses. *See, e.g.*, State's Exs. 5, 8 (R. 82 Atts. 2, 5). Other exhibits detail voting by persons with felony convictions, some of whom may have been ineligible. *See, e.g.*, State's Exs. 3, 4, 7 & 9 (R. 79, Att. 3; R. 82 Att. 4; R. 83, Att. 1). These problems can only be prevented by an accurate registration list, not by a photo ID requirement.

Secretary Baker, condemned Georgia's initial photo ID law as "discriminatory" because "it was costly or difficult for poor Georgians." Jimmy Carter and James A. Baker III, *Voting Reform Is in the Cards*, N.Y. Times, Sept. 23, 2005. While they proposed a nation-wide, uniform photo ID, known as the REAL ID, as a requirement for in-person voting, they did so in the hope of remedying the problems created by allowing individual states—like Georgia—to impose ID requirements. They hoped that the discriminatory burdens of a photo ID requirement could be eliminated if states were obliged "to seek out citizens to both register voters and provide them with free ID's that meet federal standards," through a host of affirmative and energetic activities. *Id.* President Carter's and Secretary Baker's vision ignores the burdens on low-income voters even if the ID itself is free.[19] In any event, the Indiana law—which is even more stringent than Georgia's—is the antithesis of their vision.[20]

COHHIO STUDY: A study of alleged fraud in Ohio which is not in the record further confirms that impersonation fraud is not a problem. *See* Coalition of Homelessness and Housing in Ohio & League of

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[19] *See* Indiana Democratic Party Petitioners' Br. at 13-16.

[20] For a full critique of the Carter-Baker Report, including its endorsement of REAL IDs, *see generally* Brennan Center & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* (Sept. 19, 2005).

Women Voters Coalition, *Let the People Vote* 1 (2005), http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf. Researchers interviewed the Director or Deputy Director of each of the state's 88 county Boards of Elections and concluded that voter fraud as a whole was an "exceedingly rare" occurrence, as evidenced by the fact that, out of a total of 9,078,728 votes cast, there were only four reported instances of ineligible persons voting or attempting to vote in 2002 and 2004, confined to three of the state's 88 counties. *Id.* at 2. The report does not indicate why the four persons were ineligible, or whether polling-place impersonation fraud was involved.

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In sum, the national evidence—including the very evidence relied on by the courts below—suggests that the type of voting fraud that may be remedied by a photo ID requirement is virtually nonexistent: the "problem" of voter impersonation is not a real problem at all.

The court of appeals nevertheless speculated that the absence of evidence of impersonation fraud might be explained by the "endemic underenforcement of minor criminal laws" and the "difficulty of apprehending a voter impersonator." *Crawford*, 472 F.3d at 953. But guesswork is misplaced where fundamental rights are at stake: courts should decide voting-rights cases on the basis of "facts rather than speculation." *Purcell*, 127 S. Ct.

at 8 (2006) (Stevens, J., concurring).[21] Further, the more reasonable explanation for the absence of evidence of polling-place impersonation fraud is that, because such fraud is extremely risky, exposes the perpetrator to severe penalties,[22] and has very little payoff, it rarely occurs.[23]

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[21] The court of appeals' statement regarding the "underenforcement of minor criminal laws" is contradicted by the fact that, since 2002, the Department of Justice has given priority to, and devoted vast resources to, the investigation and prosecution of voter fraud. *See* DOJ Report (noting establishment in 2002 of initiative requiring "expanded efforts to address election crimes" and placing "a high priority on the investigation and prosecution of election crimes"). In spite of these efforts, DOJ has found not one instance of polling-place impersonation.

[22] Voter impersonation in a federal election can result in five years' maximum imprisonment and $10,000 maximum fines. *See* 42 U.S.C. § 1973i(c). Under Indiana law, impersonation fraud is punishable as a Class D felony by three years maximum imprisonment, and $10,000 maximum fines. *See* Ind. Code §§ 3-14-2-12, 35-50-2-7(a).

[23] Notably, the court of appeals posited that some voters are likely to be discouraged from voting rather than incur the time and trouble to obtain a photo ID, because a single vote supposedly has a low "instrumental value"—*i.e.*, voters believe their individual vote will not determine the election's outcome. *See Crawford*, 472 F.3d at 951. But if

The court of appeals also opined that Indiana's inflated voter registration rolls created an "acute danger" of impersonation fraud. *Crawford*, 472 F.3d at 953. But central to Congress's enactment of HAVA was the conviction that states' maintenance of accurate, updated registration lists is the best remedy for the dangers created by inflated, outdated registration lists. Indiana citizens should not be burdened with photo ID requirements to remedy a speculative threat created by Indiana's failure to comply with federal law. The court of appeals dismissed Congress's remedy as ineffectual, without any basis in fact and contrary to the views of Congress and election experts. *See, e.g.*, 148 Cong. Rec. S10491 (2002) (statement of Sen. Bond) (noting that HAVA "requires states to set up a computerized, statewide voter registration system to maintain the names of all registered, eligible voters [and eliminate the risk that rolls will contain] the names of people who have left the jurisdiction, who are not eligible to vote because of their status as a felon, who are deceased or who are not eligible to vote in that jurisdiction for any number of reasons").

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that is true, impersonation fraud is likely to be discouraged by the severe penalties for such conduct, because there would be little reason to incur such great risks for a payoff of such low "instrumental value."

B. Alleged Perceptions Or Fears of Voter Fraud Do Not Justify Indiana's Photo ID Requirement

The district court advanced an alternative justification for the photo ID requirement that is equally unpersuasive: Indiana's interest in responding to public perceptions or fears of voter fraud. In upholding the photo ID requirement, the district court credited "several polls indicating voter concern about election fraud and support for photo identification requirements at the polls." *Rokita*, 458 F. Supp. 2d at 794. The court's reliance on these public opinion polls was wrong for several reasons.

First, none of the cited polls reflects any public concern with polling-place impersonation fraud. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Exs. 22 – 24 (R. 84, Atts. 2-4)). A Gallup poll relied on by the district court showed that two-thirds of Americans had little confidence in the fairness of the 2000 Presidential election—and that 68% of African Americans felt "cheated" after that election. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 23 (R. 84, Att. 3) (Wendy W. Simmons, *Black Americans Feel Cheated by Election 2000*, Gallup News Service, Dec. 20, 2000)). Much of this sentiment reflected concerns that valid votes would not be counted and was entirely unconnected to any threat of impersonation fraud. *See* Simmons at 6. The only poll relied on by the district court which manifested public support for photo ID laws does not identify which of those surveyed were voters who already had drivers licenses and other acceptable photo IDs and for whom a photo ID requirement imposes virtually

no burden, and which, if any, were disadvantaged voters who do not have photo IDs and who must incur the burdens of obtaining one to vote. *See Rokita*, 458 F. Supp. 2d at 794 (citing State Ex. 22 (R. 84, Att. 2)). The majority of voters already have acceptable photo IDs. It is therefore not surprising that many of them would unthinkingly support such a requirement without considering the effects it might have on voting by disadvantaged citizens who lack photo IDs.

Second, "perceptions" and fears of voter fraud are subject to manipulation and hence unreliable.[24]

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[24] The perception of voter fraud is very different than the appearance of corruption that is the basis for upholding campaign finance restrictions. As this Court recognized, the ability to regulate activity protected by the First Amendment must be supported by evidence justifying the precise fear, which must in turn justify the regulation. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and then later in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), the Court repeatedly cited the extensive factual record of corruption that Congress had compiled to justify the regulation of particular acts of campaign finance, and even then it sufficed only where it imposed merely a "marginal restriction" on protected activity. *See Buckley*, 424 U.S. at 20-21; *McConnell*, 540 U.S. at 124-25, 129-31, 145-50. In contrast, there is no factual record of any impersonation fraud supporting an appearance of such fraud that would justify Indiana's regulation. Moreover, with respect to campaign finance regulation, the "appearance of corruption is inherent in a system

As the Missouri Supreme Court held in striking down Missouri's photo ID law, even where such perceptions are real, if it upheld the law based on "the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used as a mechanism for further burdening the right to vote or other fundamental rights." *Weinschenk*, 203 S.W. 3d at 218.

This Court has stated that "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy" and that "voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S. Ct. at 6. But nothing could be more damaging to confidence in the integrity of our electoral process than if such fears were generated by baseless claims of voter fraud that are being exploited to gain support for unnecessarily stringent identification requirements that suppress voting by low income and minority citizens and are seen as a "not-too-thinly-veiled attempt to discourage election day turnout by certain folks believed to skew Democratic." *Crawford*, 472 F.3d at 954 (Evans, J. dissenting).[25]

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permitting unlimited financial contributions." *Buckley*, 424 U.S. at 27. But there is no inherent appearance of impersonation fraud in voting by eligible voters who lack photo IDs but have other identification acceptable in virtually every state.

[25] For concerns about the manipulation of claims about voter fraud, *see, e.g.*, Tova Wang, *A Rigged*

Finally, under our Constitution, the fundamental rights of the most vulnerable members of our society may not be stripped away by majority vote or opinion polls. *See, e.g.*, *Lucas* v. *Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964) ("[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.") (quotation marks omitted); *id.* at 737 n.30 ("It is too clear for argument that constitutional law is not a matter of majority vote.") (quotation marks and citation omitted).

C. A Photo ID Requirement Is Not Needed To Prevent Possible Impersonation Fraud

Forty-eight states and Congress have adopted laws for identifying voters that provide less onerous alternatives to a photo ID, as did Indiana's laws until 2005. The absence of evidence of impersonation fraud shows that these laws, together with criminal laws severely penalizing such fraud, are adequate to prevent impersonation fraud. Hence, Indiana has neither a compelling nor an important interest justifying the added burden that acquiring the requisite photo ID imposes on the vulnerable voters most likely to lack one.

Report on U.S. Voting?, Wash. Post, Aug. 30, 2007; *see also* Ian Urbina, *Panel Said To Alter Finding on Voter Fraud*, N.Y. Times, Apr. 11, 2007.

1. *Indiana's Policies for Identifying Voters Prior to the Adoption of the Photo ID Requirement Provided an Adequate Alternative to Photo ID*

Prior to 2002, most states, including Indiana, did not require *any* documentary proof of identity. *See, e.g.*, Electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006* 13 (2006), *available at* http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf ("Electionline Study"). Under Indiana's voting procedures, any questions about identity were addressed by comparing the voter's signature at the polls to a photocopy of her signature in the registration records. See Ind. Code § 3-11-8-25 (2002). If her signature were challenged, the voter could affirm by affidavit that she was qualified to vote in that precinct and then cast a regular ballot. *Id.* § 3-11-8-22.

Indiana revised its election code in 2003 (effective in 2004), *see* Ind. P. L. 209-2003, § 134, in response to the federal Help America Vote Act of 2002 ("HAVA"), *see generally* 42 U.S.C. § 15301, *et seq*. Congress passed HAVA in response to the deeply flawed 2000 election and the widespread problems that occurred when administrative errors resulted in eligible voters being left off the registration rolls—and denied the right to vote. Among other provisions, HAVA requires that first-time voters who register by mail, and whose registration information cannot otherwise be verified against other government databases, must confirm their identities through a variety of widely available documents: a current and valid photo ID, a current utility bill, bank statement,

government check or paycheck, or another government document that shows the name and address of the voter. *See id.* § 15483(b)(2), b(3)(B).

In 2003, Indiana adopted HAVA's requirements for first-time voters who register by mail, who were then required to provide some form of documentary identification—including a range of non-photo ID showing the name and address of the voter. *See* Ind. Code § 3-11-8-25 (2004). Despite the lack of any evidence of actual or threatened impersonation fraud rendering these ID provisions inadequate to prevent such fraud, just two years later, in 2005, the Indiana legislature mandated that all in-person voters (except nursing home residents voting in their nursing homes) display a photo ID issued by the state or federal government and bearing an expiration date. The absence of polling-place impersonation fraud shows that the imposition of a new, stringent photo ID requirement is not needed to prevent polling-place impersonation fraud.

It is also pertinent that Indiana's law is at odds with less burdensome alternatives adopted by the federal government in HAVA, and by forty-eight of Indiana's sister states and that these states, like Indiana, have not had an impersonation fraud problem.

2. Less Onerous Methods of Voter Identification in Other States Provide Adequate Alternatives to Photo ID

In 48 states and the District of Columbia, a photo ID is not the exclusive requirement for casting

a ballot that will count. These states provide alternative means for confirming voters' identities, and as the absence of any meaningful evidence of impersonation fraud indicates, these alternatives are sufficient to protect the integrity of elections.

As noted, prior to 2002, most states did not require voters to show *any* documentary identification before voting in person. *See supra* at 27. And although all states have now implemented HAVA's identification requirements and request some form of documentary identification—including non-photo ID—from first-time voters who registered by mail and have not been "matched" against government databases, *see* Electionline Study at 17; *supra* at 27-28, besides Indiana, only one other state—Georgia—currently requires all voters to produce photo identification before their ballots will be counted. *See generally* National Conference of State Legislatures, *State Requirements for Voter Identification* (Feb. 1, 2007), http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm ("NCSL Study").

Twenty-three states and the District of Columbia require the documentation enumerated in HAVA only from first-time voters registering by mail, *see* NCSL Study; *see also* Electionline Study at 17.[28]

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[28] These states utilize a variety of mechanisms to verify the identities of other voters. *See generally* Electionline.org, Voter ID Laws (Oct. 17, 2006), *available at* http://www.electionline.org/Default.aspx?tabid=364 ("Voter ID Laws"); NCSL Study.

while Kansas and Pennsylvania require the ID specified in HAVA from all first-time voters.

The remaining twenty-five states require all voters—whether first-time or "repeat" voters—to produce some documentary ID. Eighteen of these states[27] request that all voters produce some form of documentary identification, but accept both photo and non-photo ID. *See generally* Electionline Study at 17; Voter ID Laws.[28] Only seven states—Florida,

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Some states permit these voters to verify identity by signing a registration card or book for comparison with a signature on a master list. *See, e.g.*, Nev. Rev. Stat. § 293.277; N.J. Stat. Ann. § 19:31a-8. Other states confirm voters' identities by having the voter orally recite or affirm identifying information. *See, e.g.*, Mass. Gen. Laws ch. 54, § 76; Neb. Rev. Stat. § 32-914; Utah Code Ann. § 20A-3-104.

[27] Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Mexico, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington.

[28] The list of acceptable forms of ID varies, but almost every state's list includes options for voters that are either contained in the text of HAVA, or closely related to its model. *See generally* Voter ID Laws. Various states have augmented HAVA's list of acceptable IDs with additional, widely available alternative forms of documentary proof. *See id.* Moreover, in many states, voters lacking documentary identification can prove identity

Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota—require voters to display a photo ID when they vote in person, but five of these seven states provide meaningful alternatives that allow voters lacking photo IDs to cast votes that are counted. Only Indiana and Georgia fail to provide a non-photo ID alternative to voters lacking a photo ID.[25]

The five remaining states with laws that request photo IDs of all voters provide voters who

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through non-documentary means, such as reciting unique identifying information or signing an affidavit. *See generally* Voter ID Laws; NCSL Study; *see also, e.g.*, N.M. Stat. §§ 1-12-7.1, 1-1-24; Conn. Gen. Stat. § 9-261(a).

[25] After initially enjoining Georgia's original photo ID law, *see Common Cause/Georgia* v. *Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), a federal district court subsequently rejected the litigants' standing to challenge an amended version of the law, *see Common Cause/Georgia* v. *Billups*, 504 F. Supp. 2d 1333 (N.D. Ga.), *appeal filed* No. 07-14664C (11th Cir. 2007). The court nevertheless opined in dicta that the amended law was constitutional, noting, *inter alia*, that Georgia had amended the law in an attempt to minimize the burdens on voters; did not require voters to provide birth certificates to obtain free IDs; and conducted an extensive outreach and education campaign targeting voters likely to lack photo IDs—measures absent in Indiana. *See Common Cause/Georgia*, 504 F. Supp. 2d at 1378-80.

lack photo ID with various less burdensome alternatives. A Michigan voter lacking a photo ID may sign "an affidavit to that effect before an election inspector and [will] be allowed to vote" a regular ballot. Mich. Comp. Laws § 168.523. South Dakota voters without a photo ID may also vote after completing an affidavit. *See* S.D. Codified Laws § 12-18-6.2. And in Louisiana, a voter lacking photo ID may vote after signing an affidavit so long as she provides either a current voter registration certificate or other information requested by the election commissioners of her precinct. *See* La. Rev. Stat. Ann. § 18:562(A)(2).

Hawaii's voter identification statute provides that "[e]very person shall provide identification if so requested," Haw. Rev. Stat. § 11-136, and the website of Hawaii's Office of Elections makes clear that all voters "will be asked to . . . verify . . . identity with a picture ID." Hawaii Office of Elections, *How to Vote at the Polling Place* (Nov. 9, 2007), http://www.hawaii.gov/elections/voters/howtovote.htm. Hawaii's official manual for polling-place procedures, however, directs poll workers to accept various forms of non-photo ID, and makes clear that if a voter is unable to produce documentary ID, she is simply asked to recite her date of birth and home address, and if the voter's responses match the information contained in the poll book, she may vote a regular ballot. *See* Hawaii Office of Elections, Chairperson and Voter Assistance Official's Manual 58-59 (2006); NCSL Study.

Finally, in Florida, voters lacking photo ID may sign an affidavit, and Florida will count the ballot if the signature on the affidavit matches that

on the registration form: the voter is not required to make an additional trip to an election office or to return to the polls with ID, as in Indiana. *See* Fla. Stat. §§ 101.043(2), 101.048(2)(b).

* * *

There is no evidence that polling-place impersonation fraud represents a genuine problem anywhere in the United States, and less onerous alternatives have proven more than adequate to prevent it. The additional hurdle to voter participation erected by Indiana's photo ID requirement cannot be justified as a reasonable, nondiscriminatory remedy to prevent impersonation fraud. Indiana's imposition of this additional obstacle to electoral participation that primarily burdens disadvantaged voters is an unnecessary and unreasonable means of preventing impersonation fraud. It, therefore, violates the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

November 13, 2007

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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,

v.

TODD ROKITA, *ET AL.*,
Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* THE CENTER FOR EQUAL OPPORTUNITY AND PROJECT 21 IN SUPPORT OF STATE RESPONDENTS [VOTER ID IMPACT RESEARCH]

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INTEREST OF THE *AMICI*[1]

The Center for Equal Opportunity is a nonprofit research, education, and public advocacy organization. The Center devotes significant time to promoting color-blind equal opportunity and racial harmony, and works to advance race-neutral principles in the areas of education, public contracting, public employment, and voting. The Center, which advocates the cessation of racial, ethnic, and gender discrimination by all public and private entities, has participated as *amicus curiae* before the Court in several matters relating to racial equality under the law.

Project 21, which is an initiative of The National Center for Public Policy Research, promotes the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. A fundamental tenet of Project 21 is that no American should be denied the right to vote on account of race.

SUMMARY OF ARGUMENT

Petitioners have made two broad assertions regarding the alleged impact of the Indiana voter identification requirement, neither of which comports

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund this brief's preparation or submission. The parties have filed letters with the Clerk of the Court consenting to the filing of any *amicus curiae* brief.

with existing empirical data. First, Petitioners suggest that the Indiana law has an appreciable, negative effect on voter participation in elections. And, second, Petitioners claim that the law's requirements fall disproportionately on certain segments of the population—namely, minorities, the poor, and the elderly.

Neither assertion, however, is consistent with the available empirical data measuring the effects of the Indiana law. The most recent study that examines Indiana concludes there was no negative effect in 2006 from the law with respect to either voter turnout or possible disparate impact on certain segments of the population. The only other available Indiana-specific study is a snapshot telephone poll that was simply not designed to measure the impact of the new law over multiple elections.

Petitioners' assertions are also belied by empirical data and studies that have measured the impact on voter identification laws generally around the country. Those studies have almost universally concluded that voter participation has not been negatively affected by voter identification requirements and that there have not been disparate effects from those identification requirements on certain specific segments of the electorate. The only study purporting to find negative effects from voter ID requirements has been roundly criticized for its dubious methodology and conclusions.

ARGUMENT

The broad question in this case is whether Indiana's present voter ID law is impermissible under the federal Constitution. *Amici* present this brief to explore what the available empirical evidence and social science studies tell us about the actual and potential impact of the Indiana law on voting. Petitioners and their supporting *amici* have posited that the voter ID law imposes a significant burden on voting and voting participation and that the burden falls disproportionately on certain groups—the poor, minorities, and the elderly—who tend to vote Democratic. *E.g.*, Dem. Br. 31-36.

Petitioners' claims find no support in the only published study of voter turnout in Indiana since the implementation of Indiana's voter ID requirement in 2005. The study, conducted by Professor Jeffrey Milyo of the Truman School of Public Affairs at the University of Missouri, found that statewide voter turnout *increased* by about two percentage points after the enactment of voter ID; that counties with a greater percentage of poor and minority voters had a statistically insignificant *increase* in relative turnout; that counties with a greater percentage of elderly or less educated voters had no significant change in relative turnout; and that counties with a higher percentage of Democratic voters had a significant relative *increase* in turnout. *See* Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, 18-19 (Nov. 2007) (available at http://truman.missouri.edu/uploads/Publications/Report%2010-2007.pdf) ("Milyo").

* * *

Petitioners and their *amici* begin their argument with the presumption that any increase in the "cost" of voting (*i.e.* anything that makes voting, in some sense, more difficult) will necessarily reduce the propensity of eligible voters to actually vote. Dems. Br. 23; Alvarez Br. 5-6. But this assumption is not necessarily true, especially where the issue surrounds incremental prerequisites to voting, and not restriction versus no restriction. In other words, Indiana, like every other state in the country, already has imposed permissible "costs" on voting, like requiring voters to register or requiring some minimal self-identification at the polls (like signing one's name). Any discussion regarding the burden on voting allegedly caused by the Indiana voter ID law must measure the incremental impact of the law relative to other undoubtedly lawful "costs" or limitations. *Accord* Milyo, at 3-4 ("it is highly unlikely that anyone sufficiently motivated to register to vote, inform themselves about the current election issues, and transport themselves to a polling place will then be deterred by the incremental requirement of presenting proper identification at the polls").

The presumption also fails to account for the fact that reductions in voter participation, if the empirical data indeed were to show such reductions, after anti-fraud restrictions are implemented, may be a result of the successful elimination of fraud, not the suppression of legitimate voters. To this end, John R. Lott, in his study, posited three different hypotheses about the possible effects of voter ID laws on voter participation rates:

> 1. The Discouraging Voter Hypothesis: This hypothesis assumes there is little or no fraud to eliminate and that, to the extent the regulations have any effect, they will discourage legitimate voters from voting.
>
> 2. The Eliminating Fraud Hypothesis: This hypothesis predicts that the voter participation rate will decline as the regulations eliminate voter fraud.
>
> 3. The Ensuring Integrity Hypothesis: This hypothesis assumes that greater confidence that the election is fair will encourage additional voter participation.

John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates* (revised Aug. 18, 2006) (available at http://www.vote.caltech.edu/VoterID/ssrn-id925611.pdf) ("Lott"); *see also* Milyo, at 5 ("there exists a long-standing political science literature that does not support recent assertions that photo ID requirements have dramatic and detrimental effects on turnout"). As Lott points out, it also may be true that any or all of these effects can be occurring at the same time. Lott, at 5. Petitioners and their *amici* simply do not acknowledge the possibility that their assumption that voter turnout among legitimate voters will be depressed by voter ID requirements is untrue.

In any event, these hypotheses serve as the backdrop to what the data actually show. And, in this case, the data are clear. The Indiana law has not had a negative effect on voter turnout and has not had a

disparate impact on certain segments of the population.

I. The Empirical Data from Indiana Show That Indiana's Voter Identification Law Has Not Had a Negative Effect on Voter Turnout or a Disparate Impact on Any Segment of the Electorate

A number of studies have been mentioned at various stages of this litigation that purport to measure the actual or potential impact of voter ID requirements on voting behavior. But only two studies concern Indiana specifically, and only one of those studies examines the actual effects of the Indiana voter ID law relative to past elections.

That study, done by Professor Jeffrey Milyo, "evaluates the effects of photographic voter identification requirements implemented in Indiana prior to the 2006 general election." Milyo, at 1. According to Milyo, the comparison between the 2002 general election and the 2006 general election "provides a nearly ideal natural experiment for estimating the effects of photo ID on voter turnout across the 92 counties in Indiana." *Id.* The voter ID law was the only major change in Indiana election law between these elections and both of these elections were mid-term federal elections, neither one of which had a major contested statewide race (the 2006 U.S. Senate race featured the Republican incumbent, Sen. Richard Lugar, running without Democratic opposition). *Id.* at 9.

Milyo measured voter turnout as a percentage of the voting age population (VAP) in each election year and as a percentage of the estimated number of citizens of voting age in each year. *Id.* at 10. Milyo determined that voter turnout as a percentage of VAP was about two percentage points higher in 2006 versus 2002, with the mean change within each county being about 1.76% higher. *Id.* at 12. Milyo concluded that the presence of the Senate race alone at the top of the ticket likely could not explain the increase in turnout. *Id.* Indeed, historically, the presence of a non-competitive Senate race at the top of the ticket tends to lead to lower turnout in Indiana.

Importantly, Milyo's statistical analysis showed that there was no consistent evidence that Indiana counties with higher percentages of minorities, the poor, elderly, or less-educated persons suffered any reduction in voter turnout relative to other counties. *Id.* at 15, 16, 17. Indeed, Milyo's numbers suggested an *increase* in relative turnout for counties with a greater percentage of minorities or poor. *Id.* at 15-16. Furthermore, Milyo found a statistically significant relative *increase* in turnout for counties with a higher percentage of Democratic voters. *Id.* at 17. Simply stated, Milyo—the only available study examining the effect of the Indiana voter ID law at issue here—concludes there was no negative effect on voter turnout and no disparate impact in the communities Petitioners have singled out as being negatively affected by the law.

Milyo's methodology stands in stark contrast to the methodology employed by the only other paper that addresses Indiana specifically. Matt A. Barreto, *et al.*,

The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate (Nov. 8, 2007) (available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf) ("Barreto, *et al.* (Nov. 2007)"). Rather than attempt to measure the actual impact of the Indiana law on turnout across multiple elections, the Barreto study is simply a snapshot, telephone poll, taken in 2007, designed to determine what persons in Indiana have "access" to photo identification. It bears noting that in the Barreto study, "access" to identification means actually possessing such identification rather than being qualified or capable of possessing such identification. Thus, a person who is otherwise capable of having an ID but who chooses not to obtain one does not have "access" to an ID under the study. Barreto, *et al.* (Nov. 2007), at 7 n.1.

It is not clear that the Barreto study establishes statistically significant differences among relevant segments of the population with respect to ID "access." The study notes, for example, that there is no statistically significant difference at the traditional 95% significance level between blacks who possess valid IDs with a correct name versus whites with such IDs. *Id.* at 13. The differences between Democrats and Republicans possessing a valid ID is nominal compared to the margin of error in the survey. And there is no indication of any real wealth-based disparity. *Id.* at 21, figure 3 (comparing possession of ID by those earning over $80,000 versus those earning under $40,000).[2]

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[2] The Alvarez *amicus* brief attempts to bolster the credibility of Barreto's Indiana study by citing Barreto's similar study of three

But even putting aside these issues, there are other fundamental problems with the Barreto study. To the extent the study uses "access" to ID as a proxy for who might actually vote, the study fails. The study acknowledges that a number of persons identified as not possessing a valid ID actually voted in 2006 by absentee ballot, which does not require possession of an ID in Indiana. *Id.* at 10 n.6. Indeed, the study fails to take into account any of the possible exceptions to the ID requirement in the Indiana law. Those exceptions permit some segment of the population in Indiana to vote without having "access" to a valid ID as defined in the study. Perhaps this explains why Milyo found no actual impact on voter turnout in any specific segment of the electorate as a result of the law.

Even the conclusions one could draw from the Barreto study, assuming it actually showed what it purports to show, are murky at best. The authors themselves merely "anticipate that photo identification laws will have a marked impact on the likelihood of racial and ethnic minorities being able to vote due not

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western states, California, New Mexico, and Washington. Alvarez Br. at 8 (citing Matt A. Barreto, *et al.*, Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters (Sept.2007) (available at http://vote.caltech.edu /VoterID/apsa07_proceeding_209601.pdf)). But Barreto's western study, if anything, undermines his Indiana work. The only disparate impact that the western study found was with respect to the possession of both a driver's license *and another* identification document—which goes beyond the Indiana requirement. Barreto, *et al.* (Sept. 2007), at 16. That study found no racial disparate impact with respect to the possession of driver's licenses alone. *Id.*

[sic] having the forms of identification required of the Indiana electoral rules." *Id.* at 5 (emphasis added). This is hardly a conclusion about whether voter ID laws generally, and the Indiana law specifically, have any concrete effect on actual voter turnout in any segment of the electorate. Only the Milyo study addresses that central issue.

II. The General Empirical Data Likewise Show That Voter Identification Requirements Do Not Have a Negative Effect on Voter Turnout or a Disparate Impact on Any Segment of the Electorate

The basic conclusion that voter ID laws do not impose serious burdens on voting in general or on any particular segments of the population is consistent with empirical data and studies that do not purport to measure the impact of the Indiana voter ID law specifically.

John Lott's study, which starts with the three hypotheses mentioned above, measures the impact of certain voting regulations on turnout among certain segments of the population. Lott examined county level data for general and primary elections beginning in 1996 and extending through July 2006. Thus, Lott, like Milyo, attempted to measure the impact of changed voting regulations over time. Lott found that "ID requirements have no significant impact on voting participation rates when all the counties for which they are imposed are examined." Lott, at 12. Interestingly, Lott also examined six "hot spots" for voter fraud, which had been identified by the American Center for Voting Rights. He found that requiring

non-photo IDs in those places actually *increased* voting participation, thus supporting the "Ensuring Integrity" hypothesis. *Id.* at 12-13.

In any event, Lott found no statistically significant impact from voting regulations on minorities, the elderly, or the poor. *Id.* at 10-12, 13. And while Lott noted that his study could not evaluate the impact of mandatory photo IDs, given its time frame, Lott found that "what can be said is that the non-photo ID regulations that are already in place have not had the negative impacts that opponents predicted." *Id.* at 13.

Jason D. Mycoff, Michael W. Wagner, and David C. Wilson conducted a different study that examines voting behavior across four elections (2000, 2002, 2004, and 2006) using data from the American National Election Studies (NES). Jason D. Mycoff, *et al.*, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* (Aug. 2007) (available at http://vote.caltech.edu/VoterID/apsa07_proceeding_211715.pdf) ("Mycoff, *et al.*"). That study specifically examines "whether the institutional constraint of stricter voter identification laws decrease, increase or have no effect on voter turnout." Mycoff, *et al.*, at 3. After coding each state's laws into one of six categories based on the stringency of the state's voting requirements, the study analyzed the relationship between the identification requirements and voter turnout. After running the statistical models, the authors concluded, after controlling for the election year, that the state voter identification laws had no significant effect on turnout. *Id.* at 12; *accord id.* at 17 ("concerns about voter identification laws affecting turnout are much ado about nothing").

Another recent study attempting to assess the impact of voter identification requirements was authored by R. Michael Alvarez, Delia Bailey, and Jonathan N. Katz. R. Michael Alvarez, *et al.*, *The Effect of Voter Identification Laws on Turnout* (Oct. 2007) (available at http://www.vote.caltech.edu/media/documents/wps/vtp_wp57b.pdf) ("Alvarez, *et al.*"). Examining aggregate data from elections between 2000 and 2006, the study found no evidence that voter identification requirements reduced voter participation. Using individual data, however, from the Current Population Survey, the study found that the strictest forms of voter identification had a negative impact on voter participation relative to the very weakest requirement—merely stating one's name. Even under this latter finding, however, the study determined there was no discriminatory impact with respect to "nonwhite registered voters." *Id.* at 21.

Significantly, it bears noting that the study's latter conclusion regarding the impact of voter identification clearly has no relevance to the Indiana situation. The authors acknowledge that the negative impact of the more restrictive voter identification requirements is relative to the "weakest requirement of stating one's name" to vote. *Id.* But before 2005, Indiana was a signature-match state, not a state-your-name state. Ind. Code § 3-11-8-25(a) (2005) (repealed 2006). This distinction alone makes it impossible to apply the study's even limited conclusions regarding any possible negative impact of voter identification requirements to Indiana.

Two nearly identical studies—one produced under the auspices of the Eagleton Institute at Rutgers University, and the other separately presented to the 2006 American Political Science Association conference ("Vercellotti and Andersen") by two of the authors of the Eagleton study (together, the "Rutgers Studies")—examined the effect of voter identification turnout requirements on voter turnout in 2004 only, not over time. Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Laws on Turnout* (Sept. 2006) (available at http://vote.caltech.edu/voterID/voterID_Turnout.pdf) ("Vercellotti & Anderson"). Milyo characterizes these studies as the only ones to have concluded that ID laws have negative consequences on voter turnout. Milyo, at 6. But Milyo notes serious "methodological problems" with the studies, as well as an issue with the authors' "mischaracterizing their own findings," which does a "disservice to the public debate." *Id.* Indeed, these "Rutgers Studies" have been roundly criticized in the relevant literature and are not even cited in Petitioners' briefing. *See, e.g.*, Milyo, at 6-7; Alvarez, *et al.*, at 4 (study is "methodologically flawed"); David B. Muhlhausen & Keri Weber Sikich, *New Analysis Shows Voter Identification Laws Do Not Reduce Turnout* (Sept. 10, 2007) (available at http://www.heritage.org/ Research/LegalIssues/upload/cda_07-04.pdf) ("Muhlhausen and Sikich").

For example, among the serious problems identified in the literature, Vercellotti and Anderson examine only a cross-section of data in one election, 2004, so their study cannot measure the relative impact of ID

requirements. Milyo, at 6; Alvarez, *et al.*, at 5. By applying a one-tailed test of their hypothesis rather than the more common two-tailed test, they essentially "double[d] their chances of finding statistically significant results." Muhlhausen and Sikich, at 2. In addition, the Rutgers Studies misclassified certain of the voting requirements in the various states. *Id.*

After addressing these and other issues with the Rutgers Studies, Muhlhausen and Sikich re-analyzed the Rutgers data and concluded that voter identification laws "largely do not have the negative impact on voter turnout that the [Rutgers Studies] suggest." *Id.* at 2. And when "statistically significant and negative relationships are found, the effects are so small that the findings offer little policy significance." *Id.* at 2-3.

What is even more questionable is the decision by the Rutgers Studies (and Alvarez) to base their studies on CPS data. Buried in a footnote in the most recent Rutgers Study is this startling admission: "the voter turnout rates reported in the CPS tend to be up to 10 percentage points higher than actual turnout rate for the nation." Vercellotti and Andersen, at 9 n.11. The CPS data rely on self-reporting by the respondents of their voting behavior. As the footnote itself explains, research has shown that people tend to over-report their own voting participation (whether out of embarrassment or otherwise) and that actual voters may tend to participate in CPS studies at a higher rate than non-voters. *Id.* Thus, these authors have based their studies on data they themselves acknowledge are not accurate.

Finally, while the Petitioners do not cite or otherwise rely on the Rutgers Studies to bolster their assertions about the impact of voter ID laws, the Petitioners do mention (Dem. Br. at 12) a survey conducted by the Brennan Center for Justice, an advocacy group that has also filed an *amicus* brief supporting Petitioners in this matter. Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006) (available at http:// vote.caltech.edu/ VoterID/CitizensWithoutProof.pdf) ("Brennan Ctr."). The Brennan Center poll, however, is hardly a study on par with any of the other materials discussed in this brief. The results are reported in a three-page summary document with no supporting information and no other indicia of reliability.

The survey of 987 randomly selected American citizens was conducted in November 2006. The questions concerned only whether the respondent possessed certain forms of identification and did not address voting behavior.[3] Based on the responses, the Brennan Center drew conclusions about certain segments of the population. For example, they concluded that a quarter of African-American voting-age citizens have no government-issued photo ID.

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[3] The questions themselves are problematic. For example, question one asked specifically whether one possessed a "driver's license or a military ID," even though other forms of photo ID satisfy the Indiana statute. In addition, question three asked about "citizenship documents," but only those documents that the respondent could "quickly find" if he or she "had to show it tomorrow." Yet the urgency implied by that question is not statutorily relevant under Indiana law.

Brennan Ctr., at 3. But that conclusion is based on what statistically is likely no more than 120 African-American respondents from around the country. Indeed, another study, using a much larger sample size of people from California, New Mexico, and Washington, concluded that "Latinos and Blacks were not less likely to have a state driver's license" than their white counterparts. Barreto, *et al.* (Sept. 2007), at 16.[4]

Not surprisingly, at the 95% confidence level, the Brennan Center report notes a margin of error of plus/minus 8% for its racial disparate impact conclusion. And similarly high margins of error appear throughout the survey. As studies go in this area, the Brennan Center survey is plainly the thinnest of them all.[5]

* * *

In short, and consistent with the Indiana-specific Milyo study, the empirical data and studies from

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[4] Interestingly, this same study found that a disparate racial impact *did* exist for non-photo IDs, like bank statements and utility bills. Barreto, *et al.* (Sept. 2007), at 16. This finding casts doubt on the sincerity of Petitioners' contention that HAVA's non-photo ID requirement is the constitutional floor. Dem. Br. at 37-38.

[5] Among other things that call the reliability of the report into question, the Brennan Center survey defines "comparatively low income" as $25,000 on page 2 but as $35,000 on page 3. In addition, in footnote 3, the survey states that 135 of the respondents, nearly 14%, indicated they had *both* U.S. birth certificates and U.S. naturalization papers.

outside of Indiana do not support the conclusion that voter ID laws have any negative impact on voter turnout or disproportionately affect certain specific segments of the population.

CONCLUSION

The judgment below should be affirmed.

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AMICUS CURIAE BRIEF

Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PROFESSOR ERWIN CHEMERINSKY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY [Applicable Legal Standard]

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INTEREST OF *AMICUS*[1]

Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Professor of Political Science at Duke University School of Law. Professor Chemerinsky joined the Duke faculty in July 2004 after twenty-one years at the University of Southern California Law School, where he was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. Professor Chemerinsky has been appointed the founding Dean of the University of California-Irvine Donald Bren School of Law, which will welcome its first class in 2009.

As a scholar and teacher in the fields of constitutional law and political science, Professor Chemerinsky has an interest in clarifying the doctrinal confusion that has arisen in the lower courts—including in the court below in this case—over the correct legal standard to be applied by the courts in analyzing challenges to state election laws that are alleged to deny directly and completely certain citizens their fundamental right to vote. Professor Chemerinsky's interest relates to the legal standard to be used in the case and the needed clarification of that standard that can be established in this case, and not in the particular outcome once the correct legal standard is applied.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

It is well established that the right to vote is a uniquely precious constitutional right that is "protective of all fundamental rights and privileges". *Evans v. Cornman*, 398 U.S. 419, 422 (1970). As a result, the Court has a long line of precedents, best represented by *Dunn v. Blumstein*, 405 U.S. 330 (1972), holding that state election laws that are alleged to deny completely a citizen or group of citizens the right to vote must be analyzed under close constitutional scrutiny, requiring that the state law in question be narrowly tailored such that it is necessary to serve a compelling state interest. More recently, however, in a line of cases best represented by *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court has applied a sliding scale balancing test where the state election law at issue is alleged to have an indirect or derivative effect on the right to vote, such as restrictions on which candidates' names appear on the ballot.

Because of certain language in *Burdick* and its progeny, there is now confusion in the lower courts—as reflected by the various opinions below in this case—as to whether the *Dunn* line of cases still applies in cases, such as this one, where the challenged state election law is alleged to deny completely the right to vote to certain citizens. *Amicus* respectfully suggests that the Court should use this case as a vehicle to clarify that doctrinal confusion and to reaffirm the applicability of the *Dunn* close constitutional scrutiny test to cases such as this one where a complete denial of the right to vote is alleged.

ARGUMENT

I. THE COURT SHOULD REAFFIRM ITS CLEAR PRECEDENTS HOLDING THAT STATE ELECTION REGULATIONS THAT COMPLETELY DENY CERTAIN CITIZENS THE RIGHT TO VOTE ARE SUBJECT TO CLOSE CONSTITUTIONAL SCRUTINY.

A. The Court Has Repeatedly Held that the Right to Vote Is Fundamental and that State Laws that Would Deny that Right to Certain Citizens Are Subject to Close Scrutiny.

It is well settled that the right to vote is a uniquely precious constitutional right that is "protective of all fundamental rights and privileges". *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *accord Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. Unjustified limitations placed on who may exercise this right to vote compromise the very foundation of our democracy. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative

government."); *see also Harper*, 383 U.S. at 667 ("[T]he right of suffrage is a fundamental matter in a free and democratic society.") (quoting *Reynolds*, 377 U.S. at 561-62); *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 693 (1989) ("[T]he right to choose a representative is every man's portion of sovereign power.") (quoting *Luther v. Borden*, 48 U.S. 1, 30 (1849)).

Because the right to vote is of supreme importance, the Court has repeatedly held that state election laws that threaten to bar certain citizens from voting are subject to close constitutional scrutiny. *See, e.g.*, *Dunn*, 405 U.S. at 336-37 (holding that where a state election law denies the right to vote to a certain group of otherwise qualified citizens, but grants the right to others, "the purpose of the [state law's] restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny") (quoting *Evans*, 398 U.S. at 422); *Evans*, 398 U.S. at 422 (applying a standard of "close constitutional scrutiny" to the purpose of the restriction and the interests of the state before striking down a Maryland statute that denied the right to vote to individuals living on the grounds of a federal enclave); *Harper*, 383 U.S. at 667 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

A state election law cannot satisfy "close constitutional scrutiny" if the state does not have a "substantial and compelling reason" for the restriction imposed by the law. *Dunn*, 405 U.S. at

335. However, the mere showing of a "substantial and compelling reason" is not itself sufficient. In *Dunn*, a case frequently cited as an exemplar in this area of law, the Court explained:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' and must be 'tailored' to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

Dunn, 405 U.S. at 343 (internal citations omitted).

In support of its explanation, the *Dunn* Court quoted, *inter alia*, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), a case that helps to further elucidate the concept of close constitutional scrutiny:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in

> the light of less drastic means for achieving the same basic purpose."

Where close constitutional scrutiny applies, state election laws must be tailored sufficiently narrowly such that the law is deemed to be "necessary to promote a compelling state interest". *Dunn*, 405 U.S. at 337 (quotations and citations omitted); *see also, e.g., Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) ("[I]f a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.") (quoting *Kramer*, 395 U.S. at 627); *Wesberry*, 376 U.S. at 17-18 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

B. In Contrast, the Level of Scrutiny To Be Applied to State Statutes that Only Indirectly or Derivatively Impose Some Burden Upon the Right to Vote Is Determined by the Balancing Test in *Burdick* and *Anderson*.

The Court has held that those state election laws that indirectly or derivatively impose a burden upon the right to vote are not automatically subject to the same exacting review that has been imposed upon state statutes that wholly abrogate a citizen's right to vote. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 143-44 (1972) (comparing laws that "place a condition on the exercise of the right to vote", which

have been held to be subject to a heightened level of scrutiny, to laws that create "barriers" to candidates who wish to appear on the ballot and thereby have "at least some theoretical, correlative effect on voters", "not [all of which are] subject to a stringent standard of review").

The most influential cases in this area of law are *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), both of which reviewed state laws that worked actually or effectively to narrow the field of candidates for whom a voter could vote. In *Anderson*, the early filing deadline that Ohio required independent candidates to meet in order to appear on the ballot "[did] not create a restriction 'denying the franchise to citizens,' such as those faced by the Court in *Kramer v. Union School District*, 395 U.S. 621, 626 (1969) (emphasis omitted), *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam), *Evans v. Cornman*, 398 U.S. 419 (1970), *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and *Dunn v. Blumstein*, 405 U.S. 330 (1972)." *Anderson*, 460 U.S. at 812 (Rehnquist, J., dissenting). While the filing deadline and other ballot access laws did not threaten to disenfranchise voters completely, the *Anderson* Court found such laws had "at least some theoretical, correlative effect on voters", *Anderson*, 460 U.S. at 786, and "affect[ed]—at least to some degree—the individual's right to vote and his right to associate with others for political ends", *id.* at 788.

Because the Ohio law before the Court in *Anderson* did not threaten to disenfranchise voters completely, as had the laws considered in earlier cases such as *Dunn*, the Court was not compelled to

apply the close constitutional scrutiny required by *Dunn* and its progeny. Instead, the *Anderson* Court undertook an "analytical process" that involved "consider[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" on the one hand, and "identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed by its rule" on the other hand. *Id.* at 789.

In *Burdick*, the Court considered a challenge to a Hawaii law that prohibited write-in voting. Like the Ohio filing deadline considered in *Anderson*, the Hawaii law at issue in *Burdick* did not threaten to bar any group of citizens from casting a ballot, but rather narrowed the field of potential candidates for whom a vote could be cast. Accordingly, the Court applied the *Anderson* balancing test to determine the level of scrutiny to apply to the Hawaii law. *Burdick*, 504 U.S. at 438 ("The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*."). The Court found that the law "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote". *Id.* at 439. Because the burden that Hawaii's law imposed upon voters was found to be "slight", the Court determined that "the State need not establish a compelling interest to tip the constitutional scales in its direction". *Id.* The Court found that ballot access laws such as Hawaii's ban on write-in voting will be "presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally

will be counterbalanced by the very state interests supporting the ballot access scheme". *Id.* at 441.

Since the Court decided *Burdick*, it has continued to apply the balancing test in *Burdick* and *Anderson* to evaluate state election regulations that impose some indirect burden upon, but do not absolutely deny, citizens' right to vote. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (applying *Burdick* to evaluate a Minnesota antifusion law that prohibited candidates from appearing on the ballot as the candidate of more than one party).

C. There Exists Uncertainty Regarding the Extent of the Range of Election Laws to Which the Balancing Test in *Burdick* and *Anderson* Applies.

Although in recent decades the Court has heard a number of cases in which it considered statutes that were asserted to burden indirectly the right to vote, since the 1975 decision in *Hill v. Stone*, 421 U.S. 289 (1975), the Court has not reached the merits of a case in which a party asserted that a state election law threatened wholly to deny the right to vote. As a result, confusion exists regarding whether cases that consider laws that deny completely the right to vote to certain citizens continue to be controlled by the line of cases that includes *Dunn*, requiring close constitutional scrutiny, or whether such cases are now controlled by the balancing test in *Burdick* and *Anderson*. *Compare Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952-53, 954 (7th Cir. 2007) (refusing to apply strict scrutiny, instead following *Burdick* and

Anderson, applying a balancing test, and finding that "it is beyond question that States may, and inevitably must, enact *reasonable* regulations of parties, elections, and ballots") (emphasis added) (quotation omitted), *with id.* at 954 (Evans, J., dissenting) (suggesting that the balancing test in *Burdick* is "something akin to 'strict scrutiny light'"), *and Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (en banc) (Woods, J., dissenting from denial of rehearing en banc) ("[T]he panel assumes that *Burdick* also means that strict scrutiny is no longer appropriate in *any* election case. As Judge Evans makes clear, however, *Burdick* holds no such thing."), *and Stewart v. Blackwell*, 444 F.3d 843, 861-62 (6th Cir. 2006) (rejecting *Burdick* in favor of strict scrutiny upon finding that Ohio voters were "disenfranchised by antiquated voting equipment") (citation omitted) (opinion later rendered moot by technological advancements in *Stewart v. Blackwell*, 473 F.3d 692, 694 (6th Cir. 2007) (en banc)). *See also Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1359-66 (N.D. Ga. 2005) (invalidating photo identification law after applying, in the alternative, both *Dunn* and *Burdick*); Br. for Pet'rs in No. 07-21 at 34 (noting that there is "some uncertainty" as to whether *Dunn* or *Burdick* is the proper standard for reviewing a state election law that imposes conditions on the right to vote).

The decisions of the Court have not clarified the confusion. On the one hand, *Burdick* instructed in broad terms that "[a] court considering a challenge to a state election law" must apply the sliding scale balancing test in *Anderson*. *Burdick*, 504 U.S. at 434.

On the other hand, the Court: (1) has never overruled *Dunn* or similar cases that plainly hold that state election laws that threaten to deny completely certain citizens the right to vote are subject to close scrutiny; (2) recently cited *Dunn* approvingly, with no citation to either *Burdick* or *Anderson*, in *Purcell v. Gonzales*, 549 U.S. __, 127 S. Ct. 5 (2006), a case that involved an Arizona measure that required voters to present proof of citizenship in order to register to vote and proof of identification in order to vote[2]; (3) has never explicitly held that state election laws that assertedly threaten to deny completely the right to vote are now subject to the balancing test in *Burdick* and *Anderson*; and (4) has never applied the balancing test in *Burdick* and *Anderson* to a state election law that assertedly threatened to deny completely the right to vote.

Amicus respectfully suggests that the Court should take this opportunity to clarify this area of law by explicitly holding that state election laws that assertedly threaten to deny completely the right to vote to certain citizens remain in the province of the line of cases that includes *Dunn*, and are therefore subject to close constitutional scrutiny, while state election laws that assertedly otherwise impose some

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[2] The issue before the Court in *Purcell* was whether the interlocutory injunction issued by a two-judge motions panel of the Ninth Circuit Court of Appeals, which enjoined application of the Arizona measure during the November 2006 elections, was proper. The Court did not reach the question of whether the Arizona measure was constitutional, nor did it determine the level of scrutiny to which the measure should be subjected.

indirect burden upon the right to vote are subject to the balancing test of *Burdick* and *Anderson*.

D. Where a State Election Law Threatens To Bar Completely Otherwise Eligible Citizens from Voting It Should Be Subjected to Close Scrutiny.

The line of cases that includes *Dunn* is correct in holding state election laws that threaten to deny completely an individual right as fundamental as the right to vote to an "exacting" level of scrutiny that requires that the law be tailored sufficiently narrowly such that it is deemed to be necessary to promote a compelling state interest, *Dunn*, 405 U.S. at 337, 343; *see also, e.g.*, *Cipriano*, 395 U.S. at 704 ("[I]f a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'") (quoting *Kramer*, 395 U.S. at 627). The Court should reaffirm the validity of that line of cases. The line of cases that includes *Dunn* is concerned with the complete denial of the right to vote, a right that is "the citizen's link to his laws and government [and] is protective of all fundamental rights and privileges". *Evans*, 398 U.S. at 422. On the other hand, the ballot access line of cases such as *Burdick* and *Anderson* is concerned with only an indirect effect upon the right to vote that derives from a narrowing of the field of candidates for which a vote can be cast (or cast effectively).

There is no question that the Constitution bestows upon the states the power to determine

"[t]he Times, Places and Manner of holding Elections for Senators and Representatives". U.S. Const. art. I, § 4, cl. 1. However, while a state clearly has an interest in preserving the sanctity of the ballot box, "[a] State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)); *see also Tashjian*, 479 U.S. at 217 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote."). The evaluation of a ballot access law, which the Court performed in *Burdick* and *Anderson*, is well-suited to a sliding scale balancing test that "examine[s] in a realistic light the extent and nature of [the law's] impact on voters", *Anderson*, 460 U.S. at 786, and seeks to match a level of scrutiny to the alleged harm to voters. Presumably, "laws that affect candidates" can indirectly impose countless different types of "theoretical, correlative" burdens upon voters, *see id.*; it would, therefore, be illogical to subject all laws that affect candidates in some way to an identical level of constitutional scrutiny. In sharp contrast, there is no doubt about the "nature" of the effect upon voters of laws that are found to disenfranchise completely certain voters, and no sliding scale is required to match the level of scrutiny to the type of harm at issue. The Court should continue to demand that laws that deny completely a right as fundamental as the right to

vote be narrowly tailored and necessary to promote a state interest that is indeed compelling.

Weeks before deciding *Burdick*, the Court considered *Burson v. Freeman*, 504 U.S. 191 (1992), a case that presented an issue analogous to the issue decided in *Dunn*. Both cases involved a conflict of a fundamental individual right—freedom of speech in *Burson*, the right to vote in *Dunn*—with the state's interest in administering its elections. In *Burson*, a state election law that prohibited "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place" on election day was challenged on First and Fourteenth Amendment grounds. *Id.* at 193. The Court found that the law at issue "implicate[d] three central concerns in [its] First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech". *Id.* at 196. On the other hand, the Court recognized that the state "indisputably ha[d] a compelling interest in preserving the integrity of its election process". *Id.* at 199. The *Burson* Court, much like the *Dunn* Court, held the state law "subject[ ] to exacting scrutiny [whereby the state was required to] show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end". *Id.* at 198 (internal quotations omitted).

Amicus does not suggest, however, that subjecting a law to close constitutional scrutiny should amount to a death knell. As the Court explained in *Storer v. Brown*, 415 U.S. 724 (1974):

> "It has never been suggested that the Williams-Kramer-Dunn rule automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress."

Id. at 729; *see also, e.g., Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"); *Burson*, 504 U.S. at 193, 211 (holding that Tennessee's law prohibiting "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place" on election day survived "strict scrutiny"). *Amicus* takes no position on whether the Indiana law now before the Court should survive close constitutional scrutiny.

The Court should remain faithful to its precedents in cases such as *Dunn*, which hold that state laws that threaten to deprive citizens of the fundamental constitutional right to vote are subject to a form of close scrutiny that requires states narrowly to tailor such laws to a compelling state interest so as to minimize the deprivation of a right that is of such supreme importance. A right as fundamental as the right to vote cannot be adequately protected from direct infringement by the sliding scale balancing test applied by *Burdick* and *Anderson*. The Court has never applied that balancing test to a statute that threatened to bar certain citizens from casting a ballot at all, and it should not start now.

CONCLUSION

The Court should reaffirm its decisions in the line of cases that includes *Dunn*, and apply close constitutional scrutiny to state election laws that threaten to bar completely certain citizens from exercising their fundamental right to vote.

November 13, 2007

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

No. 07-21

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* THE CONSERVATIVE PARTY OF NEW YORK STATE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person show government issued photo identification violates the First and Fourteenth Amendments.

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INTEREST OF THE *AMICUS*[1]

The Conservative Party of New York State was formed in 1962 to restore a meaningful choice to the voters of New York State. At that time, the three existing political parties espoused a liberal philosophy of the welfare state. In 45 years, the party has grown from a small band of conservative-minded men and women to a statewide organization of almost 170,000 individuals dedicated to the traditional American values of individual freedom, individual responsibility and individual effort.

In the first statewide election in which it participated, the party garnered 141,000 votes; the Conservative Party has twice since then received over 1,000,000 votes for its candidate in a statewide election.

In 1970, James Buckley was elected to the U.S. Senate as a Conservative Party candidate; in 2001 Conservative Party Executive Vice Chairman James P. Molinaro was elected Borough President of Staten Island and was reelected in 2005. In the past 45 years, the Conservative Party has played pivotal rolls in electing state officials, including Governor, Attorney General, United States Senator, State Supreme Court Justices, County Executives, and many local officials. The Conservative Party provided the margin of victory in New York for, among others, President Ronald Reagan, Governor George Pataki, United States Senator Alfonse D'Amato, and Comptroller Ned Regan. The party has also been responsible for the margin of defeat for numerous major party candidates who did not share the Party's

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution to its preparation or submission.

The parties have filed letters consenting to the filing of any *amicus curiae* brief with the Clerk of the Court.

principles and against whom the Conservative Party ran its own candidates. The current state legislature includes 35 State Senators and 48 Assembly Members with Conservative Party designation. The 109th Congress included eight representatives from New York State who hold Conservative designation. Statewide the Conservative Party has forged strong links to Republicans and Democrats of compatible views. *See*, George Marlin, FIGHTING THE GOOD FIGHT: A HISTORY OF THE NEW YORK CONSERVATIVE PARTY (2002).

As the oldest extant and significant "minor" party in a major state, the Conservative Party has a keen and abiding interest in the integrity of the electoral process and in ensuring that legitimate votes are not diluted by voter fraud and other irregularities.

The Conservative Party lacks the resources of the major parties to mount an intensive "get out the vote" effort on election day, and it is thus especially dependent on deterrence of voter fraud to avoid or minimize dilution of the legitimate votes of its supporters.

Amicus submits this brief in support of Respondents' position that the State of Indiana's voter identification requirement and provisional balloting law, Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1 ("Voter ID Law") does not violate the First and Fourteenth Amendments to the United States Constitution.

SUMMARY OF THE ARGUMENT

The Indiana Voter ID law imposes a slight burden only on a relatively small number of potential voters. It is not like other election regulations that the Court has subjected to strict scrutiny, such as poll taxes, requirements of lengthy residence, or property ownership because it does not deny the franchise to an entire class of residents that could not easily, could not at all, achieve eligibility to vote

The Voter ID Law provides for procedural protection of election integrity and should not be subject to strict scrutiny. This Court has held that procedural safeguards are subject to review that balances the State's interest in preventing election fraud against the minor burdens imposed by the law. The Voter ID law does not erect serious barriers to voting that affect large segments of the potential voting population. The State has a compelling interest in preventing voting fraud, specifically the "in person" voting fraud.

The Court's recent voter qualification jurisprudence has adopted a sensible balancing test – weighing the state's interest in ensuring the integrity of its electoral system against the the character and magnitude of the asserted injury. Voting fraud impairs the rights of legitimate voters to vote by diluting their votes, which is an impairment of *their* right to vote, and this interest also must be weighed in the balance. Under this balancing approach, Indiana's Voter ID law serves a compelling state interest in preventing voter fraud, and Indiana has such a compelling interest, and it imposes only a very slight barrier to voting by otherwise eligible voters. Plaintiffs' argument that any burden on the right to vote, however slight or however small the number of voters affected, is not constitutional unless it is shown to serve a "compelling state interest" has been rejected by the Court.

States may, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related

disorder. This is what Indiana has done by adopting its Voter Photo ID law.

Petitioners do not advance any coherent criterion that would permit *any* effective efforts to protect legitimate voters from dilution of their vote, without proof of prior massive voter fraud.

ARGUMENT

THE INDIANA VOTER IDENTIFICATION LAW SHOULD NOT BE SUBJECTED TO "STRICT SCRUTINY" AND DOES NOT CREATE MAJOR BARRIERS TO THE RIGHT TO VOTE OF LARGE NUMBERS OR PARTICULAR CLASSES OF PEOPLE AND IS NOT UNCONSTITUTIONAL

The Indiana voter identification law (the "Voter ID law") at issue requires, with certain exceptions, that persons wanting to vote in person in either a primary or a general election must present a government-issued photo ID at the polling place (*see* Ind.Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1), unless the person either wants to and is eligible to vote by absentee ballot or lives in a nursing home. Ind.Code §§ 3-11-8-25.1(e), 3-11-10-1.2; *see Indiana Democratic Party v. Rokita*, 2006 WL 1005037 (N.D.Ind. Apr. 14, 2006). The Voter ID law's requirement that a person wishing to vote present a government-issued photo ID, such as a passport or a driver's license, is of course no problem for people who have such a document. *Crawford v. Marion County*, 472 F.3d 949, 953 (7th Cir. 2007) Most people do, in fact, have such photo identification; as the Court of Appeals noted, it is virtually impossible to accomplish many ordinary tasks without either a driver's license or the equivalent.[2] People who vote by absentee ballot (and anyone 65 or over or who lives in a nursing home can vote by absentee ballot) do not need to produce photo identification to vote. Non-driver's license identification is free

to voters, and indigents needing to pay a fee for a birth certificate to obtain identification are exempt from the Voter ID Law. Ind. Code § 3-11.7-5-2.5(c).[2]

The Voter ID law imposes a slight burden only on a relatively small number of potential voters, and affects only on a very small percentage of the state's population.[3] Evidence of this minimal impact includes the fact that none of the Petitioners has identified a single member of its organization or a single constituent who was unable to vote because of the Indiana Voter ID Law. *See Crawford v. Marion County*, 472 F.3d 949, 951-52. This belies Petitioners' claim that the challenged law imposes a "severe burden" on large numbers of would-be voters and their accusations of discrimination, whether racial, class or political, and it supports Respondents' contention that the Voter ID law is narrowly tailored.

The Voter ID Law is unlike other election regulations that the Court has subjected to strict scrutiny, such as poll taxes, requirements of lengthy residence, or property ownership. The

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[2] Individuals who do not have photo IDs and must vote in person (*e.g.* because they don't live in nursing homes and are ineligible to cast absentee ballots) can get a photo ID from the Indiana motor vehicle bureau by presenting their birth certificate (or certificate of naturalization if they were born outside the United States) or a certified copy, plus a document that has their name and address on it, such as a utility bill. Anyone who does not have a photo ID at the time he or she goes to the polls can, if challenged, cast a provisional ballot and then has 10 days either to file an affidavit of indigency or to produce a photo ID. Ind.Code §§ 3-11.7-5-2.5, 3-11-8-23, 3-11-8-25.1. (*See* 472 F.3d at 950)

[3] The Voter ID Law minimizes the risk of deterring legitimate voters by providing for availability of free identification documents, exemption for absentee voters and most senior citizens, and accommodations for indigents and religious objectors. *See* Ind. Code § 3-11.7-5-2.5.

Indiana law, unlike a poll tax, does not create high barriers to poor people or, as in the case of poll taxes in Southern states, people of a particular race.[4] The Court has distinguished between such substantive voter qualifications and procedural safeguards. The former are suspect because they deny the franchise to an entire class of residents that could not easily, or could not at all, achieve eligibility to vote. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966); *Harman v. Forssennius*, 380 U.S. 528, 541 (1965). Procedural safeguards, such as advance registration requirements, establish reasonable election protocols and are relatively easily satisfied by those who wish to vote. The Voter ID Law provides procedural protection of election integrity and should not be subject to strict scrutiny. This Court has held that procedural safeguard requirements are subject to review that balances the State's interest in preventing election fraud against the minor burdens imposed by the law.

Petitioners' allege that the effect of requiring a photo ID in preventing otherwise eligible voters from exercising their franchise weighs heavily against the Voter ID law. However, that effect, the record below shows, and Respondents amply demonstrate in their brief, is slight. The principal evidence on which the Petitioners rely to show that many voters would be disenfranchised was found by the district judge as the trier of fact to be "totally unreliable" because of a number of methodological flaws, and the Court of Appeals on *de novo* review accepted that finding. (472 F.3d 949, 953)

On the other side, the State has a compelling interest in preventing voting fraud, specifically the "in person" voting fraud in which a person shows up at the polls claiming to be someone

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[4] Petitioners compare the Voter ID Law to poll taxes, and make the *reductio ad absurdum* argument that any law requiring a voter to have a document constitutes a poll tax. ACLU Brief at 36; Democratic Party Brief at 31-32.

else – *e.g.* someone who has left the district, or who has recently died, or someone who has not voted yet on that election day. Without photo ID, there is little chance of preventing this kind of fraud because poll workers are unlikely to scrutinize signatures carefully and probably untrained in recognizing handwriting irregularities. (472 F.3d 949, 953) The purpose of the Indiana law is to reduce voting fraud, which impairs the rights of legitimate voters to vote by diluting their votes, which is an impairment of *their* right to vote. This Court recently held that states have a compelling interest in preventing voter fraud. *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5, 6-7 (2006) (voter identification laws "prevent[] voter fraud").

Plaintiffs' argument that any burden on the right to vote, however slight or however small the number of voters affected, is not constitutional unless it is shown to serve a "compelling state interest" was rejected in cases decided after the cases on which they rely. A voting regulation is not suspect merely because it requires some effort on the part of citizens in order to exercise their right to vote. *Clingman v. Beaver*, 544 U.S. 581 at 593 (2005); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973). In *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), the Court noted that "election laws will invariably impose some burden upon individual voters . . . . [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." In *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983), the Court recognized the need to "consider the character and magnitude of the asserted injury."

Indiana has a compelling interest in preventing voter fraud, protecting the right to vote and to have all votes that are properly cast (and only those votes) counted. *See Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006) (per curiam) (voter identification laws serve to avert "'debasement or dilution of the weight of a citizen's

vote'"). "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433; *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens . . . severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections . . . .")

Petitioners' argument for strict scrutiny is premised largely on the contention that the Voter ID law discriminates against minorities, the poor, the elderly, non-drivers, urban residents, and Democrats. The evidence in the record does not support these assertions, as State Respondents demonstrate in great detail, Petitioners' own submissions refute them. (State Respondents' Brief at 30-42)[5,6]

Petitioners argue that the Voter ID Law imposes a "severe burden" on voting because it "departs from usual and customary

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[5] The data show no likely negative disparate impact on minorities or low-income citizens and that 99% of Indiana's voting age population already possess photo identification, which alone renders untenable Petitioners' claims of discrimination and proves the insignificance of any burdens the Law imposes; the only study of voter patterns since adoption of the Voter ID law shows no disparate impact on the groups Petitioners claim are adversely affected. *See* State Respondents Brief at 8, 32-33.

[6] Much of the "data" proffered by Petitioners and the *amici* supporting Petitioners is not in the record and could not be subjected to the usual tests of credibility, and the "examples" of adverse impact on particular voters are not in the record, are unsworn, and also could not be subjected to any test of credibility. *See, e.g.*, Brief of Asian American Legal Defense and Education Fund, Brief for Former and Current Secretaries of State. Those date and anecdotes should be not be given weight by the Court.

regulations adopted elsewhere." Dem.Br. 29; ACLU Br. 45. Verifying voter identity is an essential and long-standing criterion for the right to vote. Petitioners do not explain why the requirement to provide photo ID is significantly more burdensome than providing other customary forms of identification. The only fee involved is incidental to obtaining what 99% of voters already have[7] – a valid driver's license.[8] *Harper*, 383 U.S. at 666-68.

The problem in New York State is far from trivial. According to Lee Daghlian, an official spokesman for the New York State Board of Elections, no one checks if the person registering to vote is a citizen. That greatly concerns New York State election officials, who processed 245,000 voter registrations at Department of Motor Vehicle offices in 2006 year under the "Motor Voter" law[9]. New York State *Democratic* Assemblywoman Ginny Fields notes that the state's "Board of Elections has no voter police" and that the state probably has upwards of 500,000 illegal immigrants old enough to drive. Both Daghlian and Fields are quoted in John Fund, "This Will Make Voter Fraud Easier," *Opinion Journal*, November 2, 2007, http://www.opinionjournal.com/diary/?id=110010814.; see also Shaun Marie Levine, Executive Director of the Conservative Party of New York State, "Statement by the NYS Conservative Party at the New York State Assembly Public Hearing on Governor Spitzer's Proposal to Issue Drivers Licenses to Illegal

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[7] Petitioners concede as much. Democratic Party Brief 12; ACLU Brief 12.

[8] The United States is one of the few countries in the world that does not require every adult to carry a government-issued photo ID. Driver's licenses fill this need, and they have become a nationally accepted form of identification.

[9] National Voter Registration Act of 1993, ("Motor Voter Act"), Pub.L. 103-31, 42 U.S.C. § 1973gg, *et seq.*

Aliens," October 25, 2007, www.cpnys.org/index_files/Statement_on_Drivers_Licenses_to_Illegal_Aliens_102507_Assembly.doc.

Petitioners do not advance any coherent criterion that would permit *any* effective efforts to protect legitimate voters from dilution of their vote, without proof of prior massive voter fraud. Of course, by then it would be too late – at least one election will have been "stolen." States can surely, as with any criminal offense or civil wrong, take reasonable prophylactic measures to protect the integrity of the electoral process. The Court has repeatedly confirmed that States have a compelling interest in protecting public confidence in the legitimacy of the electoral process. As the Court unanimously acknowledged in *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7 (2006), "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."

It is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'" *Clingman v. Beaver*, 544 U.S. 581, 593, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005), quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see also Anderson v. Celebrezze, supra*, 460 U.S. at 788. In *Rosario v. Rockefeller*, 410 U.S. 752, 775, the Court distinguished inherently suspect voter qualification laws, such as laws disenfranchising soldiers, creating special electorates, and imposing durational residency requirements, from fraud prevention procedures. The Indiana has done by adopting its Voter Photo ID law is a voter fraud prevention and passes Constitutional scrutiny..

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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December 10, 2007

AMICUS CURIAE BRIEF

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Nos. 07-21 and 07-251

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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
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INDIANA DEMOCRATIC PARTY, *et al.*,
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v.

TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AFTER THE FILING DEADLINE AND BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER STATE SECRETARIES OF STATE IN SUPPORT OF PETITIONERS

[ELECTION OFFICIALS' EXPERIENCE]

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AFTER THE FILING DEADLINE

Pursuant to Supreme Court Rules 30.4 and 37.3, the Hon. Cathy Cox, Secretary of State of the State of Georgia, 1999 to 2007, and Assistant Secretary of State, 1996 to 1999; the Hon. John T. Willis, Secretary of State of the State of Maryland, 1995 to 2003; the Hon. Robin Carnahan, Secretary of State of the State of Missouri, 2005 to present; the Hon. Jennifer L. Brunner, Secretary of State of the State of Ohio since January 8, 2007; and the Hon. Deborah L. Markowitz, Secretary of State of the State of Vermont, 1999 to present, respectfully move the Court for leave to file the brief that follows after the deadline for filing an *amicus curiae* brief supporting Petitioners (November 13, 2007, at 2 p.m.).

Amici apologize for the late brief. The attached brief was filed with the Court and served on the parties electronically at 1:14 p.m. on November 13, 2007, but was not received by the Court or the parties in hard-copy form until the next morning via Federal Express.

Petitioners and Respondent Marion County Election Board consent, and the State Respondents do not object, to this request. Moreover, since the parties received timely electronic service of the brief, the granting of this motion would not prejudice them.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER STATE SECRETARIES OF STATE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI[1]

This brief is respectfully submitted by the Hon. Cathy Cox, Secretary of State of the State of Georgia,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

1999 to 2007, and Assistant Secretary of State, 1996 to 1999; the Hon. John T. Willis, Secretary of State of the State of Maryland, 1995 to 2003; the Hon. Robin Carnahan, Secretary of State of the State of Missouri, 2005 to present; the Hon. Jennifer L. Brunner, Secretary of State of the State of Ohio since January 8, 2007; and the Hon. Deborah L. Markowitz, Secretary of State of the State of Vermont, 1999 to present. Together, *amici* have more than thirty years of experience implementing state and federal election laws or overseeing elections within their respective jurisdictions.

As officials responsible for overseeing elections under a variety of voter identification laws, *amici* have special insight into the issues raised by these cases. Their experience shows that there is virtually no evidence of polling place voter impersonation fraud,[2] the stated reason for enactment of the Indiana law at issue here; that laws like Indiana's will effectively disenfranchise many eligible voters, particularly minorities, women, the elderly, the disabled, and the poor, while doing nothing to prevent polling place voter impersonation fraud; and that in their States and throughout the country, honest elections, free of polling place voter impersonation fraud, are held without onerous photo identification requirements of the type imposed by the State of Indiana.

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[2] Throughout this brief "polling place voter impersonation fraud" refers to an individual attempting to vote at the polling place in the name of another.

Amici have a strong interest in preserving and defending the integrity, fairness, and openness of the electoral process that lies at the core of our democratic system of government, the legitimacy of which depends on ensuring that all eligible citizens are able to exercise the right to vote. They are concerned that the Court's resolution of the issues in the instant cases will have a profound effect on election administration laws and future legislation in States beyond Indiana. They ask the Court to reaffirm the principle that the fundamental right to vote shall not be burdened unnecessarily to remedy an essentially non-existent problem.

SUMMARY OF ARGUMENT

The right of each eligible citizen to vote in free and open elections is fundamental to government by the people. The Indiana law at issue here ostensibly seeks to advance the State's interest in free and open elections by using voter identification requirements to prevent polling place voter impersonation fraud, a type of voting fraud of which *amici* have seen no evidence. Despite the State's considerable police powers, laws like Indiana's place the burden of preventing voter impersonation on the individual voter. The Indiana statute mandates that each voter prove his or her identity with a limited range of government-issued photo identification, even where there is no basis to question the voter's eligibility or identity, or to suspect that the voter is attempting to impersonate another, and even where election officials have adequate alternative means of identifying the voter. The limited range of identification that is acceptable under laws like

Indiana's may be obtained only through the voter's expenditure of time and money to obtain underlying documents, such as a certified birth certificate or proof of change of name. Laws like Indiana's thus severely burden the right to vote and impermissibly and unnecessarily condition the exercise of that right on the voter's disbursement of funds and ability to overcome substantial bureaucratic requirements. In the *amici*'s experience, such restrictions will prevent hundreds of thousands of citizens from exercising their fundamental right to vote, especially poor, minority, elderly, disabled, and female voters.

The experience of other States, including those in which *amici* have served, shows that States can conduct elections free of polling place voter impersonation fraud without imposing restrictions, like those in Indiana, that imperil the right of eligible citizens to vote. Further, *amici* submit that elections cannot be fair if eligible voters are prevented from voting.

ARGUMENT

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court held that, in determining the constitutionality of a state law affecting the right to vote, it is proper to weigh the burden imposed on that right against the interests served by the law. *Id.* at 434. In undertaking this balancing test, the Court is to consider "'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Based on their experience overseeing state election laws,[3] *amici* submit that the court of appeals misjudged the burdens imposed and the interests served by laws like Indiana's. The Seventh Circuit accepted the premise of Indiana's voter identification law—that the statute was necessary to combat and prevent polling place voter impersonation fraud—and emphasized that, in applying the *Burdick* balancing test, "the right to vote is on both sides of the ledger." *Crawford v. Marion County Election*

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[3] Beyond their service within their respective States, *amici* have additional experience relevant to the issues in these cases. By virtue of their affiliation with and work for the National Association of Secretaries of State ("NASS"), all of the *amici* are familiar with the election laws of other States. For example, Secretary Markowitz is the immediate past president of NASS, and Secretaries Brunner, Carnahan, and Markowitz are all members of NASS's Standing Committee on Elections, of which Secretary Carnahan is co-chair, and its Standing Committee on Voter Participation. Secretary Carnahan also serves on the Election Assistance Commission's Board of Advisors. Secretary Willis has served as a regional vice president of NASS and as vice chairman of NASS's Elections and Voter Participation Committee and Election Reform Task Force. Secretary Willis also chaired Maryland's Special Committee on Voting Systems and Election Procedures, which led to landmark legislation and implementation of state election reform measures in 2001. He has also developed and manages a program through which he has trained nearly 8,000 election judges (Maryland's name for poll workers) in Baltimore City and Baltimore County. Secretary Cox previously chaired NASS's Standing Committee on Elections, and has taught election law at the University of Georgia School of Law. Secretary Brunner served in Ohio as a member of the Franklin County Board of Elections, as a common pleas judge, as legislative counsel in the office of the Ohio secretary of state, and as a private practitioner of election law.

Bd., 472 F.3d 949, 952 (7th Cir. 2007). Yet, the court failed to take due account of the fact that there is little or no evidence in Indiana or in other States that polling place voter impersonation fraud occurs at all, much less that preventing this type of voting fraud is a compelling state interest. *Id.* at 952-54. Evidence also shows that many voters would be prevented or deterred from voting because of the burdens imposed by restrictive photo identification requirements like Indiana's. *Id.* at 951-52.

As set forth below, the specter of polling place voter impersonation fraud cannot justify the very real burdens imposed on eligible voters by photo identification requirements. Laws like Indiana's that place the burden of preventing fraud on voters lacking specific forms of photo identification—even when there is no reason to question their identity, and when their identity can be established through less burdensome means—are unacceptable. Because requirements like those imposed by the Indiana voter identification statute place burdens on the fundamental right to vote that far outweigh the interests of the State, the judgment of the court of appeals should be reversed.

I. RESTRICTIVE VOTER ID LAWS LIKE INDIANA'S WOULD IMPOSE AN UNDUE BURDEN ON MANY VOTERS' EXERCISE OF THE FUNDAMENTAL RIGHT TO VOTE

The experience of *amici* as the chief election officers in their respective states[4]—and in particular

[4] Although the Maryland Secretary of State is not the chief election official under the laws of that State, the office has

the experience of *amici* in Missouri and Georgia, two States that enacted voter photo identification statutes similar to the one at issue here—demonstrates that laws like Indiana's strike an impermissible balance between their purported goal of combating voting fraud and the burdens they place on their citizens' fundamental right to vote.

A. As Little or No Evidence of Polling Place Voter Impersonation Fraud Exists, It Does Not Justify the Burdens Imposed by Restrictive Voter ID Laws

In the experience of *amici*, there is little or no evidence that polling place voter impersonation fraud exists. If it exists at all, it is extremely rare, and does not justify the burdens imposed by laws like Indiana's. In overseeing election laws, *amici* provide access to training for local election officials, maintain and administer the centralized voter registration list to be used by local election authorities, and refer any instances of alleged fraudulent voting to the appropriate prosecutorial authorities. *See, e.g.*, GA. CODE ANN. §§ 21-2-30 to -31; OHIO REV. CODE ANN. § 3501.05; MO. REV. STAT. § 115.158; VT. STAT. ANN.

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a substantial role in the election process, including receipt of referendum petitions, drafting of ballot questions, presidential primary candidate selection, and membership on the Board of State Canvassers. *See* MD. CONST. art. XVI, § 3(b); MD. CODE ANN., ELEC. LAW §§ 6-205, 7-103, 8-502, 11-501 to -503. Moreover, with respect to election administration, laws, and procedures, Secretary Willis has been active at the local, state, and national levels for more than thirty years as an academic, lawyer, practitioner, and government official.

tit. 17 § 2154. During their tenures as secretaries of state, *amici* collectively administered or oversaw federal elections between 1996 and the present in which more than twenty-four million votes were cast, and *amici* are not aware of *any* cases of polling place voter impersonation fraud in those elections. There have been isolated reports of polling place voter impersonation fraud, but investigation of such reports has regularly shown them to be unsupported or has resulted in a decision not to prosecute, usually because the purported impersonation was either a mistake or arose from some other cause thought not to merit prosecution.[5] Instead, most of the few credible reports of voting fraud relate to fraud in voter registration or absentee voting, types of voting fraud that statutes like the Indiana law at issue would do nothing to prevent.

In Missouri, there have been no reported cases of polling place voter impersonation fraud during Secretary Carnahan's tenure or that of her predecessor, Secretary (now Governor) Matt Blunt.[6]

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[5] For example, in one case in Vermont known to Secretary Markowitz, a son attempted to vote for his father, with his father's permission, but a poll worker prevented him from doing so. Therefore, photo identification was not needed to prevent the son from voting in a name other than his own.

[6] In 2006 litigation over a subsequently invalidated voter identification statute, four long-serving local election officials and the co-director of elections for the secretary of state's office presented evidence that voter impersonation was not an issue in Missouri, and that photo identification requirements would, in any case, do nothing to prevent the most prevalent types of voting fraud alleged in the State. *See Weinschenk v. State*, 203 S.W.3d 201, 209-10 (Mo. 2006).

See, e.g., Robin Carnahan, Secretary of State, *Voters First: An Examination of the 2006 Midterm Election in Missouri* 5 (2007), *available at* http://www.sos.mo.gov/elections/VotersFirst/VotersFirst-FINAL.pdf ("As in previous elections, the absence of reports of voting impersonation or voting fraud in the 2006 election in Missouri was notable."). Moreover, then-Secretary Blunt stated publicly that statewide elections in 2002 and 2004 were "fraud-free" and "were two of the cleanest and problem-free elections in recent history." *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. 2006).

Despite the absence of evidence of polling place voter impersonation fraud in Missouri elections, the court of appeals stated that "[s]ome voter impersonation has been found . . . in the states that have been studied . . . includ[ing] . . . Missouri." *Crawford*, 472 F.3d at 953. In addition, in the courts below and in their opposition to the petitions for certiorari, Respondents have relied upon a report by Secretary Blunt that they claim documents voting fraud during the 2000 election in Missouri. *See Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 794 (S.D. Ind. 2006); Brief of Respondents in Opposition at 3. In fact, upon investigation, the U.S. Department of Justice concluded that Secretary Blunt's report was inaccurate. It found no evidence of voting fraud and instead found that tens of thousands of eligible voters had been disenfranchised because they had been improperly removed from the voter registration lists. *See* Stipulation of Facts and Consent Order, *United States v. St. Louis Bd. of Election Comm'rs*, No. 02-cv-1235 (E.D. Mo. Aug. 14, 2002), *available at* http://www.usdoj.gov/crt/voting/nvra/stlouis_cd.pdf.

Similarly, in Georgia, though there have been allegations of polling place voter impersonation fraud in the form of ballots cast by deceased voters, every one of these claims has been proven unfounded upon investigation. During her tenure, Secretary Cox's office investigated claims of polling place voter impersonation fraud and found that none were supported by the evidence. As a result, no prosecutions resulted under either state or federal law.

A report by advocacy groups examining two recent elections in Ohio concluded that only *four* votes of the more than *nine million cast* in Ohio's 2002 and 2004 general elections were deemed "ineligible or 'fraudulent'" and merited prosecution. *See* Coalition on Homelessness and Housing in Ohio & League of Women Voters of Ohio, *Let the People Vote: A Joint Report on Election Reform Activities in Ohio* 2 (June 14, 2005), *available at* http://www.cohhio.org/pdf/COH_Election_Reform_Report.pdf [hereinafter *Ohio Report*].

Likewise, in Vermont and Maryland, there has been little or no evidence of polling place voter impersonation fraud during the tenure of any *amicus* or since.

B. Restrictive Voter ID Laws Would Burden Significant Numbers of Eligible Voters

As discussed in Petitioners' briefs, elderly, poor, and minority voters are much less likely to possess the photo identification necessary to vote or the

underlying documentation required to obtain such identification. Brief of Petitioner Indiana Democratic Party at 12, 16-17; Brief of Petitioner Crawford at 13. That is consistent with the experience of *amici* in Georgia and Missouri, where statutes similar to the one enacted in Indiana were challenged in the courts. Evidence submitted in those cases established that between four and six percent of registered voters in Missouri, or approximately 169,215 to 240,000 registered voters, and more than four percent of registered voters in Georgia, or approximately 198,000 registered voters, lacked the type of photo identification required by such statutes. *Weinschenk*, 203 S.W.3d at 206; *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1362 (N.D. Ga. 2007) ("*Common Cause III*"). Similarly, in Ohio, one report estimated that approximately 357,000 citizens over the age of eighteen lacked either a driver's license or a state identification card. *See Ohio Report*, *supra*, at 5.

In the experience of *amici*, elderly, poor, and minority voters are less likely to have the required photo identification. *See, e.g.*, M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* 19 (2007), *available at* http://www.vote.caltech.edu/VoterID/GAVoterID(Bullock-Hood).pdf. Both poor and disabled voters often do not own a car and so lack a driver's license; similarly, poor voters are less likely to have a passport. Female voters face additional obstacles in obtaining photo identification because their surnames often change upon marriage and no longer match the name on necessary

underlying documents, such as birth certificates. *See, e.g., Weinschenk*, 203 S.W.3d at 208.

The experiences of the named plaintiffs in the Missouri case illustrate the impact that photo identification laws have on otherwise eligible voters who, due to age or disability, struggle to obtain acceptable photo identification. These voters include Kathleen Weinschenk, who was born in Arkansas and has cerebral palsy; William Kottmeyer, who has limited mobility and had difficulty gathering the necessary documents and standing in line to obtain his identification; and Robert Pund, who has a physical condition that inhibits his mobility. *Id.* at 209. In addition, the experience of U.S. Congressman Ike Skelton of Missouri demonstrates the burden imposed by restricting the forms of identification voters can use to prove their identity. Congressman Skelton has never had a driver's license because, due to a physical disability, he cannot drive. Local officials, despite recognizing Congressman Skelton, told him that his Congressional identification card was not acceptable as one of the underlying documents required to obtain a non-driver's license, and that they therefore could not issue him the photo identification he needed to vote. Nicole Gaouette, *House Takes Up Voter IDs*, L.A. TIMES, Sep. 20, 2006, at A1.

Also, during argument before the Missouri Supreme Court, Senior Judge Charles Blackmar asked whether he would be able to vote with his expired driver's license. Judge Blackmar, 84 years old at the time, had allowed his license to expire because he no longer drove. Judge Blackmar was

told that, under Missouri law, he would only be able to cast a provisional ballot because he was born before 1941. However, people in his situation born in 1941 or later would not be allowed to vote. *See* Tim Hoover, *Voter ID, Tax Cases Argued*, KAN. CITY STAR, Oct. 5, 2006, at B1; *see also* MO. REV. STAT. § 115.427(3).

1. The courts below underestimated the burdens imposed by restrictive voter ID laws.

The courts below concluded that only a "few" eligible voters would be adversely affected by the Indiana law. *Crawford*, 472 F.3d at 952; *Ind. Dem. Party*, 458 F. Supp. 2d at 823. That conclusion is not consistent with the experience of *amici* in Georgia and Missouri, where it was estimated that hundreds of thousands of eligible voters do not have the government-issued photo identification required by laws similar to Indiana's. The experience of *amici* in their States suggests that, in fact, a large number of voters would be deterred by such a law—many more than the putative number of "impersonators" whom the statute might prevent from fraudulently voting. Further, the unsupported assumption of the court of appeals that the "vast majority of adults have [photo] identification," *Crawford*, 472 F.3d at 951, does not justify burdening voters who lack acceptable identification, any more than a poll tax could be justified because *most* citizens could pay it.

In reaching their conclusions, the courts below mistakenly relied upon a postcard survey of poll workers conducted by the Indiana Democratic Party.

The survey identified a number of voters who lacked the required government-issued photo identification, but the court observed that each such voter was over the age of sixty-five and therefore eligible to vote by absentee ballot. From that, the district court concluded that "the lack of evidence confirms that [the Indiana statute] is narrowly tailored because *every* hypothetical individual who Plaintiffs assert would be adversely affected by the law actually benefits from one of its exceptions." *Ind. Dem. Party*, 458 F. Supp. 2d at 823 (emphasis added). The court's reasoning is unsound because, as reflected in the experience of *amici*, poll workers tend to be much older than the average voter,[7] and the survey is thus unrepresentative of the voting population. It does not demonstrate that all persons without photo identification are over the age of sixty-five and so could vote by absentee ballot.

Furthermore, voting by absentee ballot imposes its own burdens, particularly for older voters who have long sought to perform their patriotic duty by voting in person. Under laws like Indiana's, only those older voters who have acceptable photo identification could continue to vote in person; those lacking such identification would be unable to cast

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[7] In Indiana, and nationwide, the average poll worker is reported to be 72 years old. *See* Tim Koponen, *Poll Worker Shortages: Could Students Be the Solution?*, *available at* http://www.in.gov/sos/elections/hava/pdf/HSHD_LTE.pdf (last visited Nov. 12, 2007); U.S. Election Assistance Comm'n, *Background on the Help America Vote College Poll Worker Program*, *available at* http://www.eac.gov/voter/poll%20workers/background (last visited Nov. 12, 2007).

their votes in person, and instead would be required to overcome substantial bureaucratic requirements in order to vote by absentee ballot. In addition, even though all Georgia voters may now cast absentee ballots, Secretary Cox is aware of one older voter who came to the polls in a recent municipal election but left without voting. Even though the poll workers knew the voter personally, the voter lacked the identification needed to cast a regular ballot at the polls and could not obtain it in time to have a provisional ballot counted. Other older voters also left without voting because they did not bring acceptable identification with them and doubted that they could find it at home in time to return to the polls or to the local election office.

2. Missouri's and Georgia's voter ID statutes imposed significant burdens on the right to vote.

Prior to 2006, Missouri allowed voters to identify themselves through a variety of means, including a current utility bill, a bank statement, a Missouri college or university identification card, or any government document that contained the name and address of the voter. MO. REV. STAT. § 115.427 (2002) (amended 2006). A voter who did not have any of these forms of identification could still cast a regular ballot if two supervising election judges, one from each major political party, attested that they could personally identify the voter. *Id.* Since, according to election officials on both sides of the aisle, there was no evidence of polling place voter impersonation fraud in any of the 2002, 2004, or 2006 elections, these voter identification requirements were

sufficient to help ensure fair elections in Missouri. *See supra* Section I.A.

In 2006, the Missouri legislature passed a law, very similar to the Indiana statute at issue here, requiring voters to present non-expired or non-expiring government-issued photo identification in order to cast a regular ballot. *See* MO. REV. STAT. § 115.427. Under the new law, voters lacking acceptable identification had to present at least three different types of underlying documentation before they could obtain photo identification.[8] In each such instance, to obtain the necessary identification, an eligible voter would be required to present either a certified birth certificate or a U.S. passport.[9]

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[8] To obtain photo identification, Missouri citizens must provide "Proof of Lawful Presence," which typically means a certified copy of the voter's birth certificate, at a cost of $5 to $30 and a wait of as long as ten weeks; "Proof of Lawful Identity," most commonly a Social Security card; and "Proof of Residency," which can be a utility bill or government check showing the voter's address. *See Weinschenk*, 203 S.W.3d at 207-08; *Weinschenk v. State*, Nos. 06AC-CC00656, 06AC-CC00587, slip op. at 5-8 (Cir. Ct., Cole County Sep. 14, 2006); *see also* Nat'l Ctr. Health Stat., *Where to Write for Vital Records* (updated Oct. 19, 2007), *available at* http://www.cdc.gov/nchs/data/misc/10-19-07.w2w.pdf (providing information on how to obtain birth certificates in the various States). Additional certified documents—including marriage licenses, divorce decrees, court orders, adoption papers, and amended birth certificates—are necessary for individuals whose names have changed. *Weinschenk*, 203 S.W.3d at 208.

[9] Obtaining a passport itself requires presentation of a certified birth certificate or acceptable substitute documentation, which may be similarly difficult to acquire. *See* U.S. Dep't of State, *How To Apply in Person for a Passport*,

Acquiring either document involves overcoming substantial bureaucratic requirements and paying a fee. Those voters unable to obtain acceptable identification were unable to cast regular ballots, and could only in limited circumstances cast provisional ballots. *Id.* § 115.427(3).

The Missouri statute was challenged by a group of affected voters, who argued, *inter alia*, that the statute imposed an impermissible burden on the fundamental right to vote and that the costs associated with obtaining acceptable identification constituted a poll tax. Evidence presented to the Court demonstrated that there were approximately 169,215 to 240,000 registered voters who did not possess the photo identification required to cast a regular ballot. *Weinschenk*, 203 S.W.3d at 206. In addition, several plaintiffs testified that they did not have the underlying documents necessary to obtain photo identification. *Id.* at 208-09. For example, plaintiff Maudie Mae Hughes testified that, despite several attempts to obtain a birth certificate, her birth state of Mississippi had informed her on multiple occasions that it had no record of her birth. *Id.* at 209.

The Missouri Supreme Court found that the photo identification requirement imposed a heavy burden on the right to vote and was not narrowly tailored to meet a compelling state interest. *Id.* at 221-22. Based on that finding, it affirmed the lower court's holding that the law violated the Missouri State

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http://travel.state.gov/passport/get/first/first_830.html (last visited Nov. 12, 2007).

Constitution's guarantees of equal protection and the right to vote. *Id.*

In Georgia, before 2005, voters could present any one of seventeen acceptable forms of identification, including non-photo identification such as a Social Security card, current utility bill, or a bank statement showing the voter's name and address.[10] GA. CODE ANN. § 21-2-417(a) (2004) (amended 2006). A voter lacking such identification was entitled to cast a regular ballot simply by signing an affidavit swearing that he or she was the person identified on the elector's certificate. *Id.* § 21-2-417(b) (2004) (amended 2006). Election officials could then compare the signature on the affidavit to that on file. As in Missouri, Georgia's pre-2005 voter identification requirements were sufficient to help ensure fair elections.

In 2005, the Georgia legislature enacted a statute, similar to Indiana's, requiring voters to present government-issued photo identification before they could cast a regular ballot. *See id.* § 21-2-417 (2005) (amended 2006). Voters lacking acceptable identification could no longer simply sign an affidavit of identity and cast a regular ballot; instead, they would have to cast provisional ballots, which only would be counted if they presented acceptable identification to the registrar within forty-eight

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[10] These seventeen forms of identification were selected because each would have required a voter to have appeared in person before some third party to obtain that document. In the experience of Secretary Cox, this was an effective means of preventing in-person voting fraud.

hours. *Id.* §§ 21-2-417(b) (2005) (amended 2006); 21-2-418; 21-2-419; *see infra* Section I.B.3 (discussing the fact that voters casting provisional ballots in Georgia often did not return in time with the necessary photo identification to have them counted).

Under the 2005 law, a Georgia voter seeking to obtain acceptable identification would need to pay a fee, provide various proofs of identification (including a birth certificate or U.S. passport), and visit the Department of Driver Services ("DDS"), for which there were only fifty-six full-time and two part-time customer service centers in Georgia's 159 counties. *See Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1334-35, 1340 (N.D. Ga. 2005) ("*Common Cause I*"). The law allowed for waiver of the fee for obtaining photo identification from DDS but did not waive any of the fees associated with obtaining other underlying documentation, such as a birth certificate, necessary to acquire photo identification. Additionally, the law required an applicant for the fee waiver to execute a sworn affidavit of indigence, an exercise found to be a burden and one many eligible voters would be embarrassed to undertake. *Id.* at 1363-64 (discussing GA. CODE ANN. § 40-5-103 (2005) (amended 2006)).

In litigation over the 2005 law, plaintiffs demonstrated that numerous registered voters in Georgia lacked any of the required forms of photo identification, and that many of these voters would face significant difficulties in obtaining such identification. *Id.* at 1338-42. Some eligible Georgia voters testified that they were unable to travel to a DDS office to apply for a photo identification card,

could not afford the fee, or possessed disabilities that would make it very difficult for them to follow the bureaucratic procedures for obtaining such a card. *Id.* at 1340-41. Other voters did not possess and could not procure necessary underlying documents, such as birth certificates or valid out-of-state driver's licenses, making it impossible for them to obtain a photo identification card. *Id.* at 1341-42. The court found that the 2005 photo identification requirement placed "severe" restrictions on the right to vote, *id.* at 1365, and that obtaining the necessary photo identification would require the expenditure of funds and a significant investment of time and effort to overcome the substantial bureaucratic requirements involved. *Id.* at 1359-70.[11]

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[11] After the court enjoined enforcement of the 2005 statute, the Georgia legislature attempted to retain the photo identification requirement by amending the law rather than returning to the pre-2005 statute. The amended statute provided for a slightly broader array of underlying documentation, including non-photo identification, to obtain, at no cost, a voter identification card. *See* GA. CODE ANN. § 21-2-417.1; GA. COMP. R. & REGS. 183-1-20.01 (2006); *see also Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1306-11, 1351-52 (N.D. Ga. 2006) ("*Common Cause II*"). Although the amended statute permits all voters to cast absentee ballots during the week immediately preceding an election, GA. CODE ANN. § 21-2-380(b), many counties have interpreted the statute as requiring photo identification for such early voting.

The court recently lifted its injunction against the amended statute, *Common Cause III*, 504 F. Supp. 2d at 1383. That decision has been appealed on the grounds that the 2006 amendments did not cure the law's constitutional deficiencies, because it still disenfranchises thousands of eligible voters who do not have or cannot obtain the necessary identification. *See*

3. Indiana's voter ID statute.

As described in Petitioners' briefs, *see* Brief of Petitioner Indiana Democratic Party at 10-20; Brief of Petitioner Crawford at 8-21, the Indiana law imposes burdens similar to those of the Georgia and Missouri statutes that were challenged on constitutional grounds. For example, obtaining acceptable identification under the Indiana statute requires several different forms of underlying identification, including a birth certificate. In the experience of *amici*, this will have a significant impact on the ability of minorities, women, the disabled, the elderly, and the poor to exercise their fundamental right to vote. *See, e.g.*, *Common Cause I*, 406 F. Supp. 2d at 1359-70; *Weinschenk*, 203 S.W.3d at 206-15.

Without the necessary documentation, Indiana voters—like those in States that have had similarly restrictive laws—can only cast a provisional ballot, which will not be counted unless the voter produces acceptable identification within a short period of time. In the experience of *amici*, casting a provisional ballot is no substitute for casting a regular ballot. The number of provisional ballots counted varies widely, but States, including Georgia, Missouri, and Indiana, often count fewer than half of them. *See* Kimball W. Brace, *Final Report of the 2004 Election Day Survey: Submitted to the U.S. Election Assistance Commission* ch. 6, 6-9 (2005), *available at* http://www.eac.gov/clearinghouse/

Common Cause/Ga. v. Billups, No. 07-14664-CC (11th Cir. docketed Oct. 5, 2007).

docs/eds2004/2004-election-day-survey-full-report/attachment_download/file. For instance, of the approximately 8,000 provisional ballots cast in Missouri in 2004, only 3,000 were counted. *Weinschenk*, 203 S.W.3d at 213 & n.18. During the same election, Indiana counted less than sixteen percent of the provisional ballots cast. Brace, *supra*, ch. 6, at 6-9. Recent experience in Georgia—one of the only States to hold elections, albeit on a local level, with a stringent photo identification statute in effect—further demonstrates the substantial burden such provisional voting requirements impose. For example, Secretary Cox reports that in special elections held on September 20, 2005, a low percentage of the provisional ballots cast were in fact counted because voters did not return to present acceptable photo identification within the time allowed. *See also Common Cause I*, 406 F. Supp. 2d at 1344. Voters compelled to vote provisionally were therefore more likely than not to be disenfranchised.

C. Restrictive Voter ID Laws Impose Significant Burdens on the Election System, Disadvantaging All Voters

Enforcement of restrictive voter identification laws like Indiana's would undoubtedly result in delays at the polls, as voters are challenged, their identification is checked, and those without acceptable identification are made to fill out provisional ballots. In the experience of *amici*, long lines at the polls reduce voter turnout and burden those who do vote. *See, e.g.*, Carnahan, *supra*, at 10-12 (quoting a poll worker as saying "[p]eople left because lines were too long," and a voter reporting

that, due to a forty-five minute wait, "[p]eople are leaving without voting"). Also, poll workers will need to be educated regarding the new photo identification requirement, and there is a substantial danger that the statute will not be applied consistently and uniformly. *Id.* at 12-13. States and local governments will also have to divert resources to address the educational and other costs of photo identification requirements,[12] reducing the funds available for voter registration and other election administration efforts. The Court should consider these secondary effects in determining whether a photo identification statute is, in fact, justified by the virtually non-existent threat of polling place voter impersonation fraud.

II. STATES CAN ENSURE THE INTEGRITY OF ELECTIONS WITHOUT BURDENSOME VOTER ID REQUIREMENTS

The availability of less restrictive measures is an important consideration in applying the *Burdick* test to determine the constitutionality of election laws. *See, e.g., Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 195-99 (1999) (concluding that there were existing provisions of Colorado law that provided less restrictive means of meeting the State's need to identify petition circulators). In the experience of *amici*, States have at their disposal several different

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[12] In January 2006, the Ohio legislature directed the Ohio Secretary of State and the Ohio Boards of Elections to undertake voter education concerning new voter identification requirements, but did not provide any additional funding. *See, e.g.*, OHIO REV. CODE ANN. §§ 3501.19, 3503.28.

methods of verifying voter identity that are as effective as, but much less burdensome than, laws like the Indiana statute at issue. Experience also shows that allowing voters to establish their identity, where necessary, through a variety of forms of photo and non-photo identification does not endanger the integrity of elections.

States have a number of significantly less burdensome, yet effective alternatives available to deter polling place voter impersonation fraud, such as less onerous voter identification requirements and criminal statutes penalizing voting fraud. The registration process itself serves to prevent polling place voter impersonation fraud by giving States an effective means of verifying the voter's identity. States could do this by comparing voters' signatures or other unique identifying information, such as their dates of birth or Social Security numbers, to that on file. Moreover, when given a variety of documents to choose from to prove their identity, or the opportunity to do so by some other means, such as attestation of personal knowledge by election judges, voters no longer bear the full burden of preventing fraud. Based on the experience of *amici*, it is clear that voter identification requirements like those enacted in Indiana do nothing to address the main types of voting fraud, and that less restrictive alternatives, including signature verification, are sufficient to achieve the goal of preventing polling place voter impersonation fraud.

In the experience of *amici* Cox and Willis, new technologies, such as electronic poll books, when properly deployed at polling places, may provide

another layer of protection. These devices—computers containing a complete voter registration list that create a record each time a voter signs in to vote—deter polling place voter impersonation fraud by creating an electronic record of every action taken with or by the voter.[13] Electronic poll books can also be programmed, or linked, to enable comparison of digitized copies of voter signatures from voter registration applications. In the experience of *amici*, such investments are more effective as security measures than onerous and costly voter identification requirements.

While *amici* are not aware of any evidence of significant polling place voter impersonation fraud prior to enactment of the Help America Vote Act of 2002, PUB. L. 107-252, 116 STAT. 1666 (2002) ("HAVA"), that law provides another method of voter identification that does not so severely burden voters' rights. Among other things, it requires States and local governments responsible for administering federal elections to verify the identities of voters who register by mail. This is most frequently accomplished during the registration process. Voters may submit with their registration forms their driver's license number or the last four digits of their

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[13] Different models of electronic poll book have different capabilities. For example, in Georgia and Maryland, these devices are networked within the polling place (such that a voter cannot check in with a different poll worker at the same site), but not between polling places. In the future, *amici* Cox and Willis expect that technological advances and increased resources will lead to real-time networking of all poll books within their States, providing yet another less burdensome safeguard against polling place voter impersonation fraud.

Social Security number, information which a state or local election official may then match with an existing state record bearing the same number and the voter's name and date of birth as listed on the registration form. 42 U.S.C. § 15483(b)(3)(B). Alternatively, if a voter lacks such information, he or she may submit with their voter registrations a copy of a current and valid photo identification, a copy of a current utility bill, bank statement, government check, paycheck, or any government document that shows the name and address of the voter. *Id.* § 15483(b)(3)(A).

If a voter registers by mail and fails to provide either verifying information or identification at the registration stage, HAVA provides that, in most instances, the voter must instead present identification the first time that he or she votes in person. *Id.* § 15483(b)(2)(A)(i).[14] HAVA does not—as does Indiana—limit the forms of possible identification to a select few. Instead, it allows voters to choose from among the same variety of photo and non-photo identification, many of which are available at no cost to the voter, accepted as proof of identity in the registration process. *Id.* An individual who cannot provide such identification may still cast a provisional ballot, which will be counted if state or local election officials determine that the voter is eligible to vote. *Id.* §§ 15482(a)(4), 15483(b)(2)(B). The percentage of provisional ballots

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[14] HAVA also requires first-time voters casting absentee ballots to submit identification with their ballots. 42 U.S.C. § 15483(b)(2)(A)(ii).

actually counted varies widely from state to state. *See supra* Section I.B.3.

In their capacities as Secretaries of State, all of the *amici* have worked to implement HAVA's mandates, and have seen little or no evidence of polling place voter impersonation fraud. Twenty-three States and the District of Columbia currently have only the minimum HAVA identification requirements. *See* Electionline.org, *Voter ID Laws*, *available at* http://electionline.org/Default.aspx?tabid=364 (last visited Nov. 12, 2007). *Amici* Willis and Markowitz serve or served in States that do not require more documentation than that required by HAVA. In Maryland, election judges verify voters' identities by asking them to provide their date of birth and address and to sign voting authority cards. MD. CODE ANN., ELEC. LAW § 10-310(a). Likewise, Vermont voters are required to identify themselves when they vote, but are not required to show documentary identification, except when required by HAVA. VT. STAT. ANN. tit. 17 § 2563.

In the experience of *amici* Willis and Markowitz, voter registration and the identification procedures used in their States are sufficient to verify the identities of voters casting their ballots at polling stations and to prevent polling place voter impersonation fraud. At the same time, because HAVA allows voters to establish their identities by presenting any one of a variety of forms of identification, many of which do not require voters to obtain underlying documents such as certified birth certificates, the burdens imposed on voters are far

less onerous than those imposed by laws like Indiana's.

HAVA permits States to impose stricter requirements so long as those requirements are not inconsistent with federal law, 42 U.S.C. § 15484, and a number of States have chosen to do so. Two States require all first-time voters, even if they have provided identification with their registration forms, to show some form of identification. KAN. STAT. ANN. § 25-2908(d); 25 PENN. STAT. § 3050. A larger number of other States require all voters, not just first-time voters, to provide identification. *See* ALA. CODE § 17-9-30; ALASKA STAT. § 15.15.225; ARIZ. REV. STAT. ANN. § 16-579; ARK. CODE ANN. § 7-5-305(a)(8); COLO. REV. STAT. §§ 1-1-104(19.5), 1-7-110; KY. REV. STAT. ANN. § 117.227; MONT. CODE. ANN. § 13-13-114; N.M. STAT. §§ 1-1-24, 1-12-7.1, 1-12-8; OHIO REV. CODE ANN. §§ 3503.16(B)(1), 3505.18; S.C. CODE ANN. § 7-13-710; TENN. CODE ANN. § 2-7-112; TEXAS ELEC. CODE §§ 63.001-63.009, 63.0101; WASH. REV. CODE § 29A.44.205. But, unlike Indiana, these "HAVA-plus" States do not restrict voters to government-issued photo identification. Rather, they allow voters to identify themselves through a variety of means that are often free and easily obtained—such as a utility bill, bank statement, government check, or Social Security card. With Missouri's restrictive voter identification statute having been found unconstitutional, that State has joined Ohio as a "HAVA-plus" state.

In the experience of *amici* Brunner and Carnahan, voters face much less of a burden when permitted to identify themselves through a variety of

means. Very few cases of polling place voter impersonation fraud have been reported in recent history, whether before or after the implementation of HAVA.

Several other States require voters to present some form of identification, but allow those without it to cast a regular vote upon signing an affidavit and, in some cases, providing additional identifying information. CONN. GEN. STAT. § 9-261; DEL. CODE ANN. tit. 15 § 4937; LA. REV. STAT. ANN. § 18:562; MICH. COMP. LAWS § 168.523(1); N.D. CENT. CODE § 16.1-05-07; S.D. CODIFIED LAWS §§ 12-18-6.1 to -6.2; VA. CODE ANN. § 24.2-643. Notably, in these States, eligible voters are not disenfranchised if they lack the requisite identification, and they are not forced to vote a provisional ballot, which will often not be counted. Unlike the Indiana, Georgia, and invalidated Missouri statutes, these laws provide voters with a last resort in the affidavit alternative, which can prevent disenfranchisement and provide a method for election officials to examine those affidavits and signatures for possible fraud.[15]

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[15] Two other States, Florida and Georgia, require voters to show photo identification in order to cast a regular, non-provisional ballot, but under slightly less restrictive terms than States like Indiana. Florida permits the use of many different forms of photo identification that are available to more people, including debit or credit cards and identification issued by employers, the military, schools, buyer's clubs, retirement centers, neighborhood associations, and public assistance agencies. FLA. STAT. § 101.043(1). See note 11, *supra*, for a discussion of Georgia law.

While many other States' identification requirements impose real burdens on voters, Indiana's statute is in an exclusive group—with only Georgia, since the Missouri law has been held unconstitutional—allowing only voters with one of a limited range of government-issued photo identification to cast regular ballots. Each of these forms of identification comes at a cost to the voter, and voters without identification are required, for their provisional ballots to be counted, to appear later with the identification that he or she failed to produce at the polling location. Yet, consistent with the experience of *amici* in their own States—including those with minimal identification requirements—there is little or no evidence that polling place voter impersonation fraud exists.

In states that have enacted laws imposing voter identification requirements as strict as those in Indiana, such as Georgia and Missouri, election officials have found that there were substantial burdens that fell on eligible voters, often disenfranchising them. For all those burdens, there was no countervailing benefit, as there was little or no evidence of polling place voter impersonation fraud before or after enactment of those laws.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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v.
MARION COUNTY ELECTION BOARD, *et al.*,
Respondents,
&
INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,
v.
TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* CYBER PRIVACY PROJECT, PRIVACY JOURNAL, PRIVACY ACTIVISM, LIBERTY COALITION, U.S. BILL OF RIGHTS FOUNDATION, ROBBIN STEWART AND JOELL PALMER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae Cyber Privacy Project ("CPP") is a non-partisan organization focusing on governmental intrusions against Fourth and Fifth Amendment rights of privacy, particularly in government databanks and national identification schemes for voting, travel and work, and on medical confidentiality and patient consent. CPP director Richard Sobel is a scholar of identity issues, has authored law review articles on the subject, and was an amicus with PrivacyActivism in *Hiibel v. Sixth Judicial District of Humboldt County*, 542 U.S. 177 (2004), and with the Program in Psychiatry and Law at Harvard Medical School in *Citizens for Health v. Leavitt*, 428 F.3d 167 (3d Cir. 2005), *cert. denied*, 127 S. Ct. 43 (Oct. 2, 2006). He teaches a course on "The Supreme Court and Privacy." Currently, he is a Visiting Professor at the Medill School at Northwestern University.[1]

Amicus curiae Privacy Journal is a monthly newsletter that has been in publication since 1974 and which has long reported on the trend towards a national identity card and advocated against the idea. Attorney Robert Ellis Smith is the publisher of the Privacy Journal and is the author of an account of privacy in American history, "*Ben Franklin's Web*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Site" (2004) and a report entitled "*A National ID Card: A License to Live*" (2002).

Amicus curiae Liberty Coalition works to help organize, support, and coordinate transpartisan public policy activities related to civil liberties and basic rights, and works in conjunction with groups of partner organizations that are interested in preserving the Bill of Rights, personal autonomy and individual privacy.

Amicus curiae PrivacyActivism is a non-profit organization dedicated to informing and empowering individuals about their privacy rights. Through public education, activism, and legal work, it strives to make complex issues of privacy law, policy, and technology accessible to all. PrivacyActivism was an *amicus* in *Hiibel v. Sixth Judicial Dist. of Humboldt County*, 542 U.S. 177 (2004).

Amicus curiae U.S. Bill of Rights Foundation is a non-partisan public interest advocacy organization seeking remedies at law on targeted legal issues that contravene the Bill of Rights and the related constitutional law.

Amici curiae Robbin Stewart and Joell Palmer are Marion County, Indiana voters. Mr. Stewart was denied the right to vote in the 2006 primary and general elections when he declined to provide photo identification without a warrant or some showing of probable cause. His provisional vote was not counted after he went to the clerk's office and asked that it be counted, but again declined to show photo identification. Mr. Palmer was denied the right to

vote in the 2006 primary election when he was unwilling to show photo identification. Mr. Palmer was a plaintiff in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

SUMMARY OF THE ARGUMENT

1. In order to preserve every citizen's constitutional right to vote, this Court must ensure that a predictable, constitutionally sound standard regulates when, and to what degree, the government can require that a citizen furnish identification before being allowed to exercise the fundamental right to vote. The most appropriate standard for this Court to adopt is one akin to the reasonable suspicion standard that applies when analyzing warrantless searches or seizures under the Fourth Amendment. Under such a standard, only those actually suspected of attempting to commit fraud could be required to furnish identification any more intrusive than simply stating one's name and address or signing a poll book. Only upon probable cause of voter fraud could a citizen be required to furnish photo identification.

The Indiana law before this Court contradicts this standard because: (i) the law is overbroad in that it arbitrarily requires every citizen who wishes to vote in person furnish a photo identification, even absent any suspicion of fraud; (ii) requiring photo identification is not the least intrusive means by which Indiana could serve its legitimate interest in prohibiting in-person voter fraud; and (iii) requiring that all in-person voters present photo identification has a disparate impact on certain minority groups'

ability to exercise the right to vote, and, as noted in dissent below and by Justice Kennedy in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (Kennedy, J. dissenting), even depriving one voter of the right to exercise his or her fundamental right to vote is too substantial a burden to withstand constitutional scrutiny.

2. The Voter Identification Law violates the Voting Rights Act of 1965, because it denies minority groups an equal opportunity to participate in the political process by imposing a "qualification or prerequisite to voting" that unfairly disadvantages such groups. 42 U.S.C. 1973(a).

3. The remedy for Indiana's unconstitutional abridgement of the right to vote is contained in section 2 of the Fourteenth Amendment, which calls for a reduction in the number of Representatives in Congress based upon the proportion of citizens' whose right to vote was abridged. In Indiana, this would result in a reduction in the number of Congressional Representatives by 1.

ARGUMENT

I. The Constitution Requires That A Predictable, Constitutionally Sound Standard Govern When And To What Degree The State Can Require That Citizens Identify Themselves In Order To Be Allowed To Exercise Their Constitutional Right To Vote, And The Voter Identification Law Contradicts Such A Standard.

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure'." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)(quoting *Illinois Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Voting is particularly foundational "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Harper v. Virginia State Bd. of Educ.*, 383 U.S. 663, 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)). As it has in other constitutional contexts, this Court must ensure that a predictable, proportional, constitutionally sound standard regulates when, and to what degree, the government may require that a citizen identify himself or herself to be allowed to exercise the fundamental right to vote.

For the reasons set forth by Judge Evans in his dissent from the Seventh Circuit's affirmance of the District Court's grant of summary judgment, *see Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954-57 (7th Cir. 2007) (Evans, J., dissenting),

and those set forth by Judge Wood in her dissent from the Seventh Circuit's denial of *en banc* review, *see Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437-39 (7th Cir. 2007) (Wood, J., dissenting), *amici curiae* believe that Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005 (the "Voter Identification Law") should be subject to a strict scrutiny review. *Amici curiae* further believe, for the reasons set forth by Judges Evans, that the Voter Identification Law would fail such a review. *See Crawford*, 472 F.3d at 954-57.

Nevertheless, even if strict scrutiny is not applied, this Court's jurisprudence teaches that the requirement that in-person voters present photo identification in order to be allowed to vote unconstitutionally infringes upon the fundamental right to vote, because it fails to comply with any predictable, proportional, constitutionally justifiable standard.

It is common practice that voters identify themselves to election officials in some manner in order to vote. However, the extent to which the government may require that citizens identify themselves must be carefully tailored to the circumstances presented by each individual voter. For example, many states (including Indiana, before the passage of the Voter Identification Law), require that voters state their name and address and sign a poll book to verify identity. *Amici curiae* thus suggest that there are many steps on the spectrum of "identification" between requiring a name, address and signature in a poll book, and requiring a government-issued photo identification. Those steps,

like verbally identifying oneself, verifying one's address or length of residency, having a neighbor verify one's identity, presenting a utility bill or other mail, and presenting credit cards or other similar items, are effective but not burdensome. Requiring a government-issued photo identification, as the Voter Identification Law does, is at the ultimate end of the spectrum of "identification"; it is the most intrusive form of identification. Because government-issued photo identification contains far more information than has historically been required to maintain the integrity of the electoral process, the requirement for also constitutes an invasion of privacy.

Amici curiae suggest that the government should not be permitted to require any of the more intrusive forms of identification described above, unless it can articulate some reasonable suspicion that calls into question the voter's identity. Even then, as this Court's precedent teaches, the government should not be permitted to require official photo identification based upon less than probable cause that the voter is attempting to commit fraud. *See Hiibel v. Sixth Judicial Dist. of Humboldt County*, 542 U.S. 177, 187-189 (2004) (based upon reasonable suspicion of criminal conduct, the government may only require that citizens state their name).

The reasonable suspicion standard that *amici curiae* suggests is analogous to the reasonable suspicion standard that has developed in this Court's Fourth Amendment jurisprudence, *see, e.g., Terry v. Ohio*, 392 U.S. 1, 21 (1968), and which is an expression of the balancing test that has been

applied by this Court in other constitutional contexts, including when evaluating the constitutionality of state election laws. *See, e.g., Burdick*, 504 U.S. at 434.

In application, this reasonable suspicion standard will effectively ferret out in-person voter fraud, Indiana's purported basis for requiring photo identification at the polls, *see Crawford*, 472 F. 3d at 953-54, while imposing far less of an infringement upon any individual citizen's right to vote than does the current photo identification requirement. As Judge Wood recognized in dissent below, "[v]oting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. ***Even if only a single citizen is deprived completely of her right to vote ... this is still a 'severe' injury for that particular individual.***" *Crawford*, 484 F.3d at 438 (Wood, J., dissenting) (emphasis added). This point was also aptly noted by Justice Kennedy in dissent in *Burdick*, which addressed the constitutionality of Hawaii's ban on write-in votes:

> [S]ome voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. ***For those who are affected by write-in bans, the infringement on their right to***

> ***vote for the candidate of their choice is total.***

504 U.S. 428, 447 (1992) (Kennedy, J., dissenting) (citing *Reynolds*, 377 U.S. at 555) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.") (emphasis added). [2]

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[2] Harm to many voters is evident here. For example, Petitioners demonstrate harm by identifying several people who lacked photo identification and tried unsuccessfully to obtain one, and hence were not allowed to vote. *See Brief of Petitioner Indiana Democratic Party* at 32. Similarly, *amici curiae* Stewart and Palmer were both denied the right to vote in Indiana's 2006 primary and/or general elections when they were unwilling to provide photo identification. Mr. Stewart was required to cast a provisional ballot despite being known to the election official; this provisional ballot, however, was not counted despite that Mr. Stewart traveled to the election clerk's office and requested that it be counted, because he was again unwilling to provide photo identification. In addition, the Petitioners cite evidence that 60% of applicants for photo identification at the Indiana Bureau of Motor Vehicles are turned away for lack of proper supporting documentation, and that voter turnout in Marion County declined from 2002 to 2006 after the Voter Identification Law was put in place. *See id.* at 35. Nationally, in the 2004 presidential election, voter turnout declined 3% (6% for African Americans; 10% for Hispanic Americans) in states that impose identification requirements. *See* Christopher Drew, *Lower Voter Turnout Is Seen in States That Require ID*, N.Y. TIMES, Feb. 21, 2007 (citing studies conducted by the Eagleton Institute at Rutgers University and Ohio State University, on behalf of the federal Election Assistance Commission, available at http://www.eagleton.rutgers.edu/News-Research/VoterID_Turnout.pdf).

As described in detail below, the Voter Identification Law runs contrary to the reasonable suspicion standard outlined above, because: (i) the law is overbroad in that it requires everyone who wishes to vote in person furnish a photo identification, without first seeking lesser-intrusive forms of identification and without complying with any constitutionally justifiable standard; (ii) requiring government photo identification is not the least intrusive means by which Indiana could serve its legitimate interest in prohibiting voter fraud; and (iii) requiring that all in-person voters present photo identification has a disparate impact on certain identifiable, typically minority, groups' ability to exercise their right to vote.[3]

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[3] The Voter Identification Law also runs afoul of the Ninth Amendment, which reserves unenumerated rights to the people. *See* U.S. CONST. amend. IX. In a democracy, it is the people who legitimize the government, not the government that legitimizes the people. Thus, while the government may be able to require identification and set standards for the receipt of certain government benefits, it may not do so to abridge the exercise of fundamental rights, especially the right to vote. *See generally*, Richard Sobel & John A. Fennel, *Troubles With Hiibel: How The Court Inverted The Relationship Between Citizens And The State*, 48 S. TEX. L. REV. 613 (2007).

A. This Court Should Adopt A Predictable, Proportional, Constitutionally Sound Standard To Regulate When And To What Extent The Government Can Require That A Citizen Identify Himself As A Condition To Exercise The Constitutional Right To Vote.

Absent probable cause, the government cannot infringe upon the Fourth Amendment by requiring that a citizen identify himself to any degree more intrusive than requiring the citizen state his name. *See Hiibel*, 542 U.S. at 187-89. More official identification may not be demanded even if there is reasonable suspicion that the citizen is involved in criminal activity. *See id.* at 188-89. These notions have developed under this Court's Fourth Amendment jurisprudence, as explained below. As these cases teach, this reasonable suspicion standard is a distillation of the very balancing test applied in analyzing governmental infringements upon the fundamental constitutional right to vote. *See, e.g., Burdick*, 504 U.S. at 434. Thus, requiring that there exist a reasonable suspicion of voter fraud before permitting the government to impose more intrusive forms of identification when identifying voters, is supported by this Court's precedent and is constitutionally sound. The Voter Identification Law, however, contradicts this standard because it arbitrarily allows the government to impose restrictions and conditions upon the exercise of the fundamental right to vote.

Further, the Voter Identification Law creates a system whereby citizens are essentially required to obtain a license to vote (typically a driver's license) in order to be permitted to exercise their fundamental right in the electoral franchise. Such a system of licensing voting runs contrary to the values embedded in our Constitution. *See, e.g., Hynes v. Mayor and City of Oradell*, 425 U.S. 610 (1976). In *Hynes*, this Court struck down as unconstitutional a statute requiring that canvassers, including those canvassing in connection with political campaigns, identify themselves to, and register with, the municipality. *See id.* at 611, 622. The purported justification for the requirement was crime prevention. *See id.* at 620, n. 4.

Concurring in the Court's decision, Justice Brennan wrote that "[o]ffensive to the sensibilities of private citizens, identification requirements ..., even in their least intrusive form, must discourage ... participation [in the political process]." *Id.* at 638 (Brennan, J., concurring). Justice Brennan further stated that "a requirement that one must register before he undertakes to make a public speech for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.* at 629, n.4 (Brennan, J., concurring).

Requiring a license to vote is akin to, but even more intrusive than, requiring the registration of door-to-door political campaigners. If the latter impermissibly infringes upon the First Amendment, the former no doubt infringes upon the fundamental right to vote. As the court below duly noted, "the Indiana law will deter some people from voting."

Crawford, 472 F.3d at 951. "Even if only a single citizen is deprived completely of her right to vote ... this is still a 'severe' injury for that particular individual." *Crawford*, 484 F.3d at 438 (Wood, J., dissenting). To avoid such severe injuries, it is imperative that this Court require that laws like the Voter Identification Law comport with a predictable, constitutionally sound standard, such as reasonable suspicion.

(1) The Development of the Reasonable Suspicion Standard In The Fourth Amendment Context.

A long line of cases has developed the contours of the right guaranteed by the Fourth Amendment to be free from unreasonable searches and seizures. A significant portion of these cases are devoted to addressing questions surrounding whether, and when, the government can "seize" a citizen on less than probable cause. What this Court has developed is a predictable, constitutionally sound standard under which the state is permitted to temporarily "seize" a citizen on less than probable cause, so long as the state can articulate a reasonable suspicion that the citizen is involved in criminal activity. *Terry*, 392 U.S. at 21. This temporary seizure upon a reasonable suspicion of criminal activity is intended to allow the state the opportunity to further investigate whether, in fact, a crime has been committed. *See id.* at 25. As is clear from *Terry* and its progeny, and as is described below, the reasonable suspicion standard is an expression of the balancing test that the Court employs when analyzing the constitutionality of state election laws.

The foundational case on this issue is *Terry v. Ohio*, 392 U.S. 1 (1968). There, the Court assessed the validity of a "stop and frisk" conducted by a police officer, after he observed two men engaging in conduct he deemed suspicious. *See id.* at 4-7. The Court concluded that while the officer lacked probable cause to arrest the two men, he nevertheless was within the bounds of the Fourth Amendment when he seized them, questioned them, and patted them down for weapons. *See id.* at 21-25. In so concluding, the Court noted that

> [i]n order to assess the reasonableness of [the police] conduct as a general proposition, it is necessary 'first to focus upon the governmental interests which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by ***balancing the need to search (or seize) against the invasion which the search (or seizure) entails***'.

Id. at 21 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 534-35 (1967)) (emphasis added). Thus, the reasonable suspicion standard *Terry* announced expresses the Court's balancing of the significance of the intrusion upon the protected right, against the importance of the governmental interests at stake.

Many of cases after *Terry* further demonstrate this point. For example, in *Delaware v. Prouse*, 440

U.S. 648 (1979), the Court noted that "the permissibility of a particular law enforcement practice is judged by ***balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate government interests.***" *Id.* at 654 (emphasis added). There, the Court ultimately concluded that the "***marginal contribution*** to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure ... at the unbridled discretion of law enforcement officials." *Id.* at 661 (emphasis added).

Similarly, in *Florida v. Royer*, this Court made clear that the scope of the Fourth Amendment intrusion must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." 460 U.S. 491, 500 (1983). *Royer* further stated that the "reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement concerns. The scope of the detention must be ***carefully tailored to its underlying justification***[]" and that the government must use the "***least intrusive means reasonably available***[.]" *Id.* (emphasis added).

The contours of the reasonable suspicion standard was further defined in *Kolender v. Lawson*, 461 U.S. 352 (1983). There, this Court invalidated a statute that allowed police to demand identification absent any suspicion of criminal conduct. *See id.* In concurring in the judgment, Justice Brennan

explained that, absent probable cause, the circumstances under which the state may infringe upon a citizen's Fourth Amendment rights are "***strictly defined by the legitimate requirements of law enforcement*** and by the ***limited extent of the resulting intrusion on individual liberty and privacy***." *Id.* at 363 (Brennan, J., concurring) (emphasis added). Moreover, in discussing the expansion of the power to detain absent probable cause, Justice Brennan noted that "***the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion***." *Id.* at 365 (emphasis added).

Perhaps the most pertinent case here, is *Hiibel*. 542 U.S. 177. In *Hiibel*, this Court upheld the constitutionality of a Nevada statute that required that a citizen subjected to a reasonable suspicion stop identify himself by stating his name. *See id.* In so ruling, this Court recognized the key concept that, absent probable cause to arrest, the government may not require that a citizen identify himself to any degree more intrusive than stating his name. *See id.* at 187-89. In short, absent at least reasonable suspicion, officers may not require identification documents.[4]

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[4] Consistent with the PrivacyActivism *amicus* brief and the position of the petitioners in *Hiibel*, *amici curiae* here suggest that while government officials may ask voters for identification if they have reasonable suspicion of fraud, they may not demand identification absent probable cause of fraud. *See*

Thus, a review of the standards under which this Court will permit government intrusion upon Fourth Amendment rights reveals several key concepts that have aided the development of the reasonable suspicion standard. All of these concepts are equally applicable in the context of protecting the fundamental right to vote.

First, any infringement upon a fundamental right -- the right to be free from unreasonable searches and seizures or the right to vote -- must be considered by balancing the significance of the intrusion upon the protected right, against the importance of the governmental interests.

Second, any intrusion upon fundamental rights justified by some "marginal contribution" to the stated government interest will not be tolerated. *Prouse*, 440 U.S. at 661.[5]

Third, any government intrusion upon individual liberty and privacy should be as limited

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Hiibel, 542 U.S. at 198 (Breyer, J., dissenting) ("an 'officer may ask a *Terry* detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obligated to respond*'."), *quoting Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (emphasis in original).

[5] As noted by Petitioners, in defending a law such as the Voter Identification Law, the "[s]tate 'must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'." *Brief for Petitioners Indiana Democratic Party, et al.*, at 44 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

and narrow as possible to fulfill the governmental interests at stake.

Fourth, citizens and governments have at least as much interest in protecting constitutional rights as the bedrock of "ordered liberty" as do the police in effective law enforcement.

Finally, even with reasonable suspicion of criminal conduct, the government can only constitutionally require that a suspect provide his or her name. Only with probable cause to arrest, can the government require any more intrusive form of identification.

(2) The Same Balancing Test Is Evident In This Court's Analysis Of State Election Laws.

As Judge Wood explained in dissent from the Seventh Circuit's denial of *en banc* review, this Court has applied the balancing test that yielded the reasonable suspicion standard, in the context of protecting against infringements into the fundamental right to vote. *See Crawford*, 484 F.3d at 437-39 (Wood, J., dissenting).

In *Burdick*, this Court set forth the analysis required to determine whether to apply strict scrutiny in cases involving claimed infringements on the right to vote. 504 U.S. at 434. As *Burdick* teaches,

> A court considering a challenge to a state election law must weigh "the

> character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

504 U.S. at 434 (quoting *Anderson v. Calabrezze*, 460 U.S. 780, 788-89 (1983)). In other words, the first step in evaluating a constitutional challenge to an election law is determining whether to apply strict scrutiny. In order to undertake that analysis, courts must engage in the very balancing test that is expressed, in Fourth Amendment parlance, as whether there exists a "reasonable suspicion" sufficient to justify the constitutional infringement.

The same balancing test is evident in the Court's analysis of other state election laws. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating California's "blanket primary" system by weighing the intrusion on the political parties' associational rights, against the interests of the state); *Norman v. Reed*, 502 U.S. 279, 293-94 (1992) ("To the degree that a State would thwart this interest [*i.e.*, the "constitutional right of citizens to create and develop new political parties"] by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation,

and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.") (citations omitted).

Thus, when evaluating state election laws, it is constitutionally necessary to do so by balancing the significance of the intrusion upon the protected right, against the importance of the governmental interests at stake. In the context of determining the precise circumstances, and the extent to which, the government can require that a citizen furnish identification before being permitted to exercise the fundamental right to vote, the appropriate application of such a balancing test can be articulated by asking whether there exists reasonable suspicion that the potential voter seeks to commit voter fraud. If there exists such a reasonable suspicion, a more significant governmental intrusion upon the rights to privacy and to vote may be justified; absent any such reasonable suspicion, however, the intrusion is simply too arbitrary, too significant, and too costly to basic rights, and hence fails to pass constitutional muster.

B. The Voter Identification Law Contradicts The Reasonable Suspicion Standard.

For three principal reasons, the Voter Identification Law contradicts the reasonable suspicion standard that *amici curiae* suggest should be applied when determining whether the government can require any form of identification from a prospective voter. First, the Voter

Identification Law is overbroad. Second, requiring photo identification from every voter who wishes to vote in person is not the least intrusive means to serve the government's legitimate interest in prohibiting voter fraud. Third, requiring photo identification as a condition of exercising the fundamental right to vote has a disparate impact on certain identifiable (*i.e.*, minority) groups' exercise of that right.

(1) The Voter Identification Law Is Overbroad.

Although the Voter Identification Law is purportedly intended to combat in-person voter fraud, the law is overbroad in application because it requires that every potential in-person voter furnish a photo identification before being permitted to vote. *See Crawford*, 472 F.3d at 950. This is the case even where there is ***no suspicion that the person wishing to vote is intending on committing voter fraud***. Where there is no suspicion that a particular voter is prone to committing voter fraud, the government should not be permitted to require that the voter present any of the more intrusive forms of identification. Because the Voter Identification Law arbitrarily and disproportionately requires that every voter furnish photo identification -- the most invasive of all forms of identification because of the amount and type of information included -- the statute is not only overbroad, but also fails under the reasonable suspicion standard described above.

This Court has long held overbroad statutes unconstitutional, most often in the First Amendment context. Three such cases are particularly noteworthy here: *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Schneider v. State*, 308 U.S. 147 (1939), and *Maryland v. Munson*, 467 U.S. 947 (1984).

In *Schaumberg*, the statute required permits for door-to-door solicitations, and required that to be eligible for such a permit an organization must use at least seventy-five percent of its receipts for charitable purposes. *See* 444 U.S. at 622. In holding that charitable solicitations are protected speech under the First Amendment and holding that the statute was unconstitutionally overbroad, the Court agreed

> that the 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village [of Schaumberg] is entitled to protect. We also agree that the Village's proffered justifications are inadequate and that the ordinance cannot survive scrutiny under the First Amendment.

Id. at 636.

Preventing fraud was the principal justification for the statute. *See id.* at 636. The Court, however, found that although there was a

legitimate interest in preventing fraud, the town could "serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id.* at 637. The Court noted that the type of fraud sought to be prevented by the statute could be addressed by the establishment of criminal laws targeting such conduct, a more narrowly-drawn measure. *Id.* at 639. In this regard, the Court stated that "[b]road prophylactic rules in the area of free expression are suspect. Precision and regulation must be the touchstone." *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Similarly, in *Munson*, the statute involved an ordinance that prohibited door-to-door solicitation by organizations that did not devote at least seventy-five percent of its receipts to charity. *See* 467 U.S. at 950, n. 2. In holding that the statute at issue was unconstitutionally overbroad, the Court noted that while the legislature's purpose was to prevent fraud and mismanagement, the statute was "too imprecise a tool to achieve that purpose." *Id.* at 967, n. 14.

In *Schneider v. State*, 308 U.S. 147 (1939), this Court found a municipal ordinance forbidding the distribution of literature from house to house without a police-issued permit violated the First Amendment. *See id.* at 164. One of the state's interests in requiring the permits was to ensure the absence of fraud in the distributed literature, or the causes being promoted. *See id.* at 163-64. The Court held that such fraud "may be denounced as offenses and punished by law" and that the more intrusive state

action of discretionary issuance of permits was unconstitutional. *Id.* at 164-65. Regarding the "denounce[ment]" of individual fraud cases, the court reasoned, "[i]f it is said that these means are less efficient and convenient than bestowal of power on police authorities ... the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Id.* at 164.

The applicable lessons from these cases are several.

First, a statute is overbroad when it is not "narrowly drawn" to serve the state's "legitimate interests." *Schaumberg*, 444 U.S. at 637; *Munson*, 467 U.S. at 967, n. 14. Requiring that all in-person voters present photo identification to prevent the specter of fraud is even less narrowly drawn and more imprecise a tool than the statutes in either *Schaumberg* or *Munson*. While Indiana has a legitimate interest in prohibiting in-person voter fraud, requiring that every in-person voter present photo identification, even absent any indication that any specific voter may commit fraud, is "too imprecise a tool." *Munson*, 467 U.S. at 967, n. 14. It is like "us[ing] a sledgehammer to hit either a real or imaginary fly on a glass coffee table." *Crawford*, 472 F.3d at 955 (Evans, J., dissenting).

Second, broad "prophylactic rules" must be avoided where they infringe upon constitutional rights. *Schaumberg*, 444 U.S. at 637. There can be no doubt that the Voter Identification Law is just the sort of prophylactic rule that the *Schaumberg* Court

had in mind: it is aimed at a particular, narrow problem -- the specter of in-person voter fraud -- but it has unnecessary implications far beyond preventing any such fraud and does so even in the absence of any evidence of voter fraud.

Third, Indiana's interest in preventing in-person voter fraud can be served by denouncing the offenses, if any, that do occur and punishing them by law. As in *Schaumberg* and *Schneider*, the state's interest in fraud prevention does not empower it to abridge citizens' constitutional freedom to vote by requiring government-issued documentation. If Indiana wishes to further prohibit the criminal act of voter fraud, it can do so through enactment and enforcement of criminal laws targeted at those who raise a suspicion of having engaged in such activities. It should not attempt to do so through arbitrary, broad-based requirements that impose significant burdens on all citizens' rights to vote.

Simply put, the Voter Identification Law casts too wide a net. If the overbroad and disproportional law were allowed to stand, the result would essentially be a system whereby the state requires a license to vote. *See supra* at 12-13. Such a system runs contrary to the values embedded in our Constitution and runs afoul of this Court's precedent. *See, e.g., Hynes*, 425 U.S. at 638 ("Offensive to the sensibilities of private citizens, identification requirements ..., even in their least intrusive form, must discourage ... participation [in the political process].") (Brennan, J., concurring).

(2) Requiring Photo Identification From Every Voter Is Not The Least Intrusive Means To Serve The State's Legitimate Interest In Prohibiting Voter Fraud.

As this Court makes clear in both the First and the Fourth Amendment contexts, any intrusion on constitutionally-protected rights must be the most minimal, narrowly tailored intrusion possible to serve the government's legitimate interests. In the case of the Voter Identification Law, however, requiring that every voter provide photo identification before being allowed to vote is not the least intrusive means by which the state could achieve its stated goal of preventing in-person voter fraud.

Indeed, a more narrowly tailored approach -- such as one that requires slightly more intrusive forms of identification (such as additional questioning or requests for corroborating documentation) from voters who election officials have a reasonable suspicion are prone to committing voter fraud -- would sufficiently serve the state's interest, while not unduly infringing upon any particular voter's right to vote.

There are many means by which election officials could (and historically have) identified voters, without requiring photo identification. Having voters sign poll books and comparing those signatures to signatures on file has been employed as a non-intrusive, yet effective, means to identify

voters in Indiana, and many other states, for many years. *See Brief for Petitioners Indiana Democratic Party, et al.*, at 4-5. Moreover, election officials could ask questions of potential voters -- such as their address, length of residency, or other similar identifiers -- and develop a reasonable certainty as to whether or not the person is who they claim to be. If the potential voter's signature does not match that on file, or the potential voter is unable to answer legitimate identifying questions, the election official may reasonably believe that the person is not who they claim to be, -- *i.e.*, ***the election official may develop a reasonable suspicion that the individual is attempting to commit voter fraud, a criminal act***. At that point, the official would be justified in escalating the investigation into the voter's identity by requesting one of the more intrusive forms of identification, such asking for corroborating documentation, or a more secure identification document if at least reasonable suspicion is developed. Only upon probable cause to arrest for voter fraud, however, should the government be permitted to require that a voter furnish photo identification. *See, e.g., Hiibel*, 542 U.S. at 188-89.[6]

These alternative measures are less intrusive and more narrowly tailored than requiring that every voter furnish government-issued photo

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[6] Under Justice Kennedy's majority decision and Justice Stevens' dissent in *Hiibel*, if there is a likelihood that being required to provide government-issued identification might be testimonial and incriminating, the citizen could invoke their Fifth Amendment privilege. *See* 524 U.S. at 189-91; *id.* at 192-196 (Stevens, J., dissenting). *See also supra* at note 2.

identification. Yet, there is no reason to believe that these measures will not just as effectively discourage and detect voter fraud. Indeed, identification measures such as these have, apparently, worked for many, many years before the passage of the Voter Identification Law, as there has never been a reported instance of in-person voter fraud in the state's history. *See Crawford*, 472 F.3d at 955 ("the defenders of this law candidly acknowledged that no one -- in the history of Indiana -- had ever been charged with" voter fraud) (Evans, J., dissenting).

In sum, the more narrowly-tailored approaches described above comport with this Court's precedent, and avoid any undue infringement upon the fundamental right to vote.

(3) The Voter Identification Law Has A Disparate Impact On Certain Minority Groups' Right To Vote.

As reflected in recent studies on voter turnout, *see supra* note 2, there can be no doubt that voter identification requirements not only discourage voter turnout, but also have a disparate impact on certain identifiable groups. These groups include:

Poor voters: Such voters often do not have access to, or frequent need for, government-issued photo identification (for example, if they utilize public transportation rather than driving). They may lose or have their identification stolen. Many in this group may not have a permanent address, a requirement to obtain a government-issued photo

identification. They also are more likely to have difficulties traveling any distance to obtain an identification. They may lack telephones and/or access to Internet services necessary to ascertain (and then contact) the appropriate agency that can provide them with a certified birth certificate or other document needed to obtain photo identification. Significantly, many who fall into this category are minorities, principally African Americans and Hispanic Americans.

Elderly voters: Such voters are also likely to encounter greater difficulty in traveling any distance to obtain identification. They may lack the savvy or wherewithal to "negotiate the system" to ascertain and contact the appropriate agency that can provide them with underlying identity documents.

Women voters: Such voters whose maiden names have changed run the risk of having the name on their photo identification not "conform" to the name on their birth certificates or voter registration.

Disabled voters: Such voters may experience much greater difficulty in traveling any distance to obtain an identification, and my have no frequent need for government-issued photo identification.

Minority language voters: Such voters whose underlying identity documents are not in English may have difficulty reading and writing English and may need, and would have to pay, to have the documents translated. They may need to obtain those documents from their countries of origin, often a difficult task. Further, minority language voters

are more likely to be intimidated by, or unable to understand, the labyrinth of paperwork necessary to obtain a photo identification or the required underlying documentation. If they have matrilineal names they run the risk of having the name on their photo identification not "conform" to the name on the voter registration list (*e.g.*, "Manuel Alvarez Bravo" or "Manuel Alvarez" or "Manuel Bravo").[7]

To the extent that any member of these groups is already registered to vote (which in Indiana does not require photo identification, *see* http://www.indygov.org/eGov/County/Voter/Registration/forms.htm), they have a vested right to vote. Requiring such individuals to obtain photo identification as a condition of exercising that vested right amounts to nothing more than a modern-day, high-tech, arbitrary re-registration requirement, is a clear denial of due process, and should not be tolerated.[8]

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[7] To the extent that members of any of these groups are also members of other groups, all of the means by which those groups rights may be abridged also apply.

[8] Assuming that voter identification requirements reduces overall turnout by 3% (*see supra* note 2), and there are approximately 4.5 million eligible voters in Indiana (*see infra* at 37), then approximately 135,000 potential voters will be deterred from voting. While there is no evidence of even one in-person fraud, even if there were 2, the ratio of discouraged voters to discouraged defrauders is roughly ***67,500:1***.

II. The Voter Identification Law Violates The Voting Rights Act of 1965.

A. The Voting Rights Act Prohibits Racial Discrimination in Voting.

The Voting Rights Act of 1965 (the "Act") was enacted under Congress's authority to enforce the Fifteenth Amendment's proscription against voting discrimination. *See Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). The Act's purpose is "to rid the country of racial discrimination in voting." *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). The Act is aimed at both obvious and subtle state laws which effectively deny citizens the right to vote because of their race. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969). Further, the Act is "intended to reach any state enactment which alter[s] the election law of a covered State in even a minor way." *Id.* at 566.

Section 2 of the Act states, in pertinent part, that "[n]o voting qualification or prerequisite to voting . . . shall be imposed . . . which results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color" or membership in certain minority language groups. 42 U.S.C. 1973(a) (emphasis added). In essence, Section 2 claims challenge "electoral law[s], practice[s], or structure[s]" that "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Proof

of intent to discriminate is not required. *See id.* at 43-44.

Under the Act, the issue is whether, as a result of the challenged law, citizens "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 44 (internal citations omitted). To that end, a violation of Section 2 is established if the "totality of the circumstances" shows the challenged law results in denying a racial or language minority an equal opportunity to participate in the political process.[9] *See* 42 U.S.C. 1973(b); *Gingles*, 478 U.S. at 46. Equal opportunity is the "ultimate right" of Section 2. *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994).[10]

B. Requiring A Photo Identification To Vote Denies Or Abridges Certain Groups' Equal Opportunity To Vote.

As the dissent in *Crawford* so pointedly noted, the Voter Identification Law "is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic." 427 F.3d

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[9] In essence, the complexity of obtaining breeder documents and government-issued identification constitutes a modern day education test to vote, historically the most popular device for disenfranchisement. See Alexander Keyssar, *The Right to Vote, A Contested History of Democracy in The United States* (Basic Books, 2000).

[10] A strict scrutiny review should apply, because the groups whose rights to vote are being abridged by the Voter Identification Law are insular minority groups. *See U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 152 n. 4 (1938).

at 954 (Evans, J., dissenting). Moreover, these "folks" are "mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof." *Id.* at 955. The Indiana law would result in the "denial or abridgement" of the right to vote of these citizens, people who encompass possibly four percent of eligible voters. *Id.* at 955.

The pragmatic concerns (difficulty in traveling to obtain identification, infrequency of other occasions for identification, lack of access to necessary documentation, etc.) are issues that flow directly from the Voter Identification Law and which will deny or abridge the equal opportunity of these already disenfranchised voters to participate in the political process. Indiana's statute is exactly the kind of "qualification or prerequisite to voting . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color" that Section 2 of the Voting Rights Act prohibits. 42 U.S.C. 1973(a). It has a disparate impact on minority voters. As "history demonstrates" about other "electoral reforms" the result is not to purify the public process but "to protect incumbents." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644, n. 9 (1996) (Thomas, J., dissenting). The Voter Identification Law should be struck down on these grounds alone.

III. The Court Of Appeals' View That Photo Identifications Are Commonplace And Necessary In Today's Society Is Misguided.

Writing for the majority below, Judge Posner incorrectly assumes that photo identifications are required and commonplace in today's society, and that without photo identification it is impossible to complete routine tasks. *See Crawford*, 472 F.3d at 951. As a justification for the lower court's conclusion that only few people will be deterred from voting because of the requirement that they obtain a government-issued photo identification, Judge Posner wrote:

> [I]t is exceedingly difficult to maneuver in today's America without a photo ID (try flying, or even entering a tall building such as the courthouse in which we sit, without one), and as a consequence the vast majority of adults have such identification[.]

Id. (citations omitted). Clearly, the majority was equating "photo ID" with a government-issued photo identification of the sort required by the Voter Identification Law. This justification, however, misstates the actual extent to which government-issued photo identifications are required today, and therefore underestimates the impact such a requirement will have on voters' abilities and desires to vote.

Take, for example, Judge Posner's belief that it is impossible to fly in an airplane without a government-issued photo identification. Contrary to this assertion, possession of a government-issued photo identification is not a requirement in order to fly in this country. This issue was recently addressed in *Gilmore v. Gonzalez*, 435 F.3d 1125 (9th Cir. 2006), *cert. denied*, 127 S. Ct 929 (Jan. 8, 2007) (No. 06-211). In *Gilmore*, a citizen challenged the constitutionality of the airline's policy of requiring photo identification in order to fly. *See id.* at 1129-30. In the course of the court's discussion, it noted that the "Security Directive" that was being challenged "require[s] airline passengers to present identification ***or be a 'selectee'***" to receive additional screening. *Id.* at 1133 (emphasis added). In short, it is possible to fly without photo identification, contrary to Judge Posner incorrect assertion below. *See also Brief of Amicus Curiae Lawyers Committee For Civil Rights Under The Law*, at 5, n. 2.

Similarly, take the lower court's example that it is impossible to enter a federal courthouse without a government-issued photo identification. A call to the federal courthouse in Chicago, Illinois, in which the Seventh Circuit sits, reveals that citizens who do not possess a driver's license or passport, can nevertheless enter the courthouse if they have some other form of non-government issued photo identification, such as a work or school identification. A call to the federal courthouse in Boston, Massachusetts similarly reveals that, while the preference is for any kind of photo identification (government- or non-government issued), a citizen can gain access to the courthouse without a photo

identification, if the citizen has non-photo identification such as credit cards or other similar items. In fact, no photo identification is required to enter this Court.

While most Americans possess some form of government-issued photo identification, as Petitioners and various *amici curiae* note in detail, many do not, and requirements for voter identifications should not be used as levers toward developing a national identification card or Real ID system. *See, e.g., Brief for Petitioner Indiana Democratic Party*, at 4, 12-20. *See also* Richard Sobel, *The Demeaning of Identity and Personhood Under the National Identification Systems*, 15 HARVARD J.L. & TECH. 329 (2002). Hence, having a photo identification is not nearly as vital to maneuverability and access in today's society as the lower court seems to believe, especially for those identifiable groups most acutely impacted by a photo identification requirement. *See supra* at 28-30. As such, the lower court failed to appreciate the significance and discriminatory effect of the requirement that all voters present government-issued photo identification, and instead improperly concluded that such a requirement is not a constitutionally cognizable infringement upon the right to vote.

IV. The Constitutional Remedy For Indiana's Abridgement Of The Right To Vote Is A Reduction in Congressional Representation.

The remedy for Indiana's unconstitutional abridgement of the right to vote is spelled out in section 2 of the Fourteenth Amendment, which clearly says that a state's Congressional representation "shall be reduced" if the state "denie[s] or abridge[s]" the "right to vote at any election for the choice of [a federal or state officeholder]." U.S. CONST, amend. XIV, § 2.[11] *Cf. Brief for Petitioners Indiana Democratic Party*, at 2. Thus, Indiana's Congressional delegation should be reduced in proportion to the percent of its population whose right to vote is abridged or denied by the Voter Identification Law.

In 2000, Indiana had a total voting age population of 4,407,679.[12] The voting age population for African Americans and Hispanics, the two groups most disadvantaged by the Voter Identification Law, was 342,087 and 136,266, respectively. The voting age population of those who considered themselves of

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[11] While Section 2 of the 14th Amendment actually only refers to male citizens 21 years and older, we can assume any such limitation was invalidated by the 19th (women's suffrage) and 26th (18 year old vote) Amendments, and the 14th Amendment now applies with respect to all eligible voters. *See* Akhil Amar, *America's Constitution, A Biography*, 392-94 (Random House, 2005).

[12] For all census figures cited herein, *See* http://www.census.gov.

two or more races, was 45,200. The total of these three identifiable groups is 523,553, or approximately 11.6% of Indiana's total voting age population. An 11.6% reduction in Indiana's 9 Congressional representatives, would reduce that number by 1, to 8. This number would be -- and no doubt should be -- larger if one were to take into account women, the disabled and the elderly.

Regardless of the actual numbers, the plain texts of the Fourteenth and Fifteenth Amendments state that any government action that "in any way abridge[s,]" the right to vote, as the Voter Identification Law clearly does, must fail constitutional scrutiny.[13]

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[13] The Fifteenth Amendment's declares that the "right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude." U.S. CONST. amend. XIV, § 1.

CONCLUSION

In sum, this Court should adopt a predictable, constitutionally sound standard to regulate when, and to what degree, the government can require that citizens identify themselves in order to be allowed to exercise the fundamental right to vote. *Amici curiae* suggest that there are many levels of identification, from stating one's name and address to providing a piece of mail, that meet the standard. Photo or government-issued identification should only be requested if there is probable cause that a voter is attempting to commit fraud. Absent that constitutional threshold, the government should only be permitted to require less intrusive forms of identification (such as asking additional questions, or requiring corroborative documentation like utility bills), and only then upon reasonable suspicion of fraud. Under such a standard, only those actually suspected of attempting to commit voter fraud could be required to identify themselves to any significant degree.

The Voter Identification Law contradicts this reasonable suspicion standard, principally because it arbitrarily requires that every citizen who wishes to vote in person furnish a photo identification, even absent any suspicion of voter fraud. This is no different than requiring a license to vote. Moreover, the requirement that all in-person voters present photo identification has a disparate impact on certain minority groups' abilities to exercise the right to vote, thereby evoking the strict scrutiny standards and violating the Voting Rights Act.

Totally depriving even one voter of the opportunity to exercise his or her fundamental right to vote is too substantial a burden to withstand constitutional scrutiny. *See Burdick*, 504 U.S. at 434 (Kennedy, J. dissenting). Accordingly, the judgment of the court of appeals should be reversed.

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Supreme Court of the United States

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Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

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v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF DEMOCRAT AND REPUBLICAN ELECTION PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE *AMICI*[1]

The Commission on Federal Election Reform co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III (the "Carter-Baker Commission") wrote, "[t]o build confidence in the electoral process, it is important that elections be administered in a neutral and professional manner."[2] *Amici*[3] share this goal.

Amici are a group of Democrat and Republican current or past election officials including the election clerks from five Indiana counties (including Marion County), and the current President, and four past Presidents, of the Association of Clerks of the Circuit Courts of Indiana. Other *amici* are local election officials from Georgia, Tennessee and Mississippi, including the past President of the Election Commissioners' Association of Mississippi.

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[1] All parties have filed letters with the Clerk consenting to the filing of *amicus* briefs in support of either party.

No counsel for a party authored this brief in whole or in part, nor made any monetary contribution to the preparation or submission of this brief. The Center for Research of Ethics in Public Policy and the Free Market, a nonprofit organization, made a monetary contribution to this brief's preparation and submission, but did not direct the brief's content or drafting.

[2] Commission on Federal Election Reform, Final Report, *Building Confidence in U.S. Elections* at 49 (Sept. 2005).

[3] *Amici* join this brief individually, and not in any official capacity or on behalf of any organization to which they belong.

Amici include current or past members of the Advisory Board of the U.S. Election Assistance Administration ("EAC"), an independent federal agency created under the Help America Vote Act ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C. § 15481).

Bob Michel was former Minority Leader of the United States House of Representatives and a member of both the Carter-Ford Commission on election reform and its successor, the Carter-Baker Commission. *Amici* Mary Kiffmeyer was formerly Minnesota's Secretary of State and President of the National Association of Secretaries of States.[4]

Amici's interest is that elections be administered to provide the greatest opportunity for all eligible citizens to participate; that the standards governing the conduct of elections be settled, clear and easily administered; and that those with responsibility for conducting elections have the means to safeguard against schemes to influence the outcome by fraud or corruption. In short, *amici* believe it should be easy to vote, but tough to cheat.

Elections are the foundation of America's political order. Elections are the means by which American citizens choose those to whom they give the honor and responsibility of governing this great nation.

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[4] *Amici's* biographical information is provided in an Appendix to this Brief.

Elections are also the means by which American citizens hold these political leaders accountable. Elections are how the citizens of this nation peacefully resolve often-divisive issues of public policy.

For these reasons, it is vital to the legitimacy of our government that elections be administered in an honest and fair manner. Modern American elections – especially for national office – are often hard-fought partisan contests in which all candidates enjoy passionate support and immense financial resources. Within the last decade, the Presidency of the United States, control of the United States Senate and the governorship of some States have been determined by only hundreds or thousands of votes. The outcome of some of these elections has been delayed by contentious recounts.

By definition there will be a winner and loser in every election. However, we all lose if the fairness and integrity of our election process is compromised.

Some of the *amici* are Democrats. Others are Republicans. But all the *amici* are Americans, and all care deeply that our elections are administered in a fair and honest manner that allows every eligible American to participate and to be confident that the outcome – especially when the results are close – was determined by the will of the voters and not some special interest "gaming" the system through vote fraud or intimidation.

As our nation enters a Presidential election year, *amici* believe it is important that the rules for the

constitutional, fair and honest conduct of elections be determined well in advance of Election Day and, to the greatest extent possible, that the election process be free of lawsuits filed and debated on the eve of Election Day, or partisan recounts in the weeks thereafter. For this reason, *amici* commend this Court for taking this case now, well in advance of the 2008 General Election. *Amici* provide the Court with this brief in the hope that its decision will be mindful of the practical considerations election officials face when seeking to administer elections in a fair and honest manner.

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that States have a compelling interest in assuring the integrity of elections, and must be granted the flexibility to combat potential fraud and corruption in the electoral process. While States are fully justified in responding to *the potential* for electoral fraud, American history – and recent events – confirm that fraud in the voter registration process, and in the conduct of balloting, does indeed occur. Protecting against the threat of real and potential vote fraud must be balanced against the desire to provide every eligible citizen access to the ballot box.

Indiana's Photo ID law is a common-sense, practical effort to strike this balance. An even stricter Photo ID requirement was endorsed by the bi-partisan Carter-Baker Commission. Photo ID measures enjoy

broad, bi-partisan public support, as reflected in the Photo ID requirements adopted in multiple States. The fact that other nations require Photo ID shows the emerging recognition that requiring such identification is a "best practice" in election administration.

Particularly in the wake of the 2000 Presidential election with which this Court is all-too-familiar, there has been increased public disenchantment and cynicism concerning the process by which our elections are conducted. Such public skepticism is troubling, and will lead to even further reductions in voter turnout. As this Court has recognized, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. ___, ___, 127 S. Ct. 5, 7 (2006) (per curiam).

A very high percentage of Americans already possess government-issued Photo ID,[5] and use it daily for everything from boarding airplanes, to entering public buildings, to renting videotapes. Photo ID is ubiquitous in modern society. Requiring that a person provide Photo ID (and allowing alternatives for those who are unable, or for reasons of conscience

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[5] See Pet. App. 69 ("an estimated 99% of Indiana's voting age population already possesses the necessary photo identification").

unwilling, to acquire it) is a reasonable and constitutional means to conduct an election.

Photo ID requirements also provide a significant additional benefit because they simplify election administration. A commonly available, uniform voter identification standard will result in more consistent treatment of each voter and will make it easier to quickly validate the voter's identity.

The lower courts found no evidence that Indiana's Photo ID requirement disenfranchises voters or suppresses turnout, either generally or among any particular group. The Petitioners – like plaintiffs in similar challenges across the country – have failed to identify *even a single voter* whom the Photo ID requirement would disenfranchise. Indeed, the available social science data suggest that voter turnout *increased* among some of the purportedly disadvantaged groups in Indiana after it adopted the contested Photo ID requirements. At a minimum, there is no evidence that Indiana's Photo ID requirements reduce voter turnout among purportedly disadvantaged groups.

ARGUMENT

I. This Court Has Repeatedly Held that States Have a Compelling Interest in Protecting the Integrity of the Election Process, and Must Be Accorded Flexibility To Accomplish that Critical Objective.

In numerous cases decided over many years, this Court has recognized the States' compelling interest

in ensuring a free, honest, and trustworthy election process. This Court has also recognized that States may act preemptively to prevent corruption of that process. As the Court observed over a century ago:

> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger * * *. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.

Ex parte Yarbrough (*The Ku-Klux Cases*), 110 U.S. 651, 666 (1884). "Free and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity." *United States v. Classic*, 313 U.S. 299, 329 (1941). "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989).

Vote fraud threatens our government's legitimacy, since it undermines public confidence in an election's outcome, and denies all citizens their constitutional right to have their votes counted equally with other, lawful votes. As *Bush v. Gore*, 531 U.S. 98

(2000) emphasized: "'the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* at 105, quoting *Reynolds v. Sims*, 377 U.S. 533 (1964). More recently, the Court reiterated that vote fraud disenfranchises and alienates legitimate voters:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Purcell v. Gonzalez, 549 U.S. ___, ___, 127 S. Ct. 5, 7 (2006) (per curiam).

The Court's decisions also recognize that, to assure the integrity of elections, States must be given the opportunity to determine the appropriate and feasible protective measures. Thus, in holding that election regulations are subject only to a "flexible standard" of review, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), emphasized that state regulation is essential to assuring honest elections, and that States must have flexibility to establish the specific procedures under which local elections will be administered:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling

> state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently. * * * The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."
>
> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote * * *."

Id. at 433-34 (citations omitted). Similarly, *Clingman v. Beaver*, 544 U.S. 581 (2005), emphasizes that "it is beyond question that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* at 593 (citation omitted).

States need not wait until after they have been robbed before locking the door. They may address potential problems preemptively, and need not wait until they mature into a full-fledged crisis:

> Legislatures * * * should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986).

II. Documented Instances of Vote Fraud Confirm the States' Interest in Implementing Reasonable Non-Discriminatory Preventative Measures.

Political power is, unfortunately, a proven inducement to corruption. As James Madison noted in Federalist 51, men are not angels and sound government must be structured in light of that unfortunate, but realistic, understanding. Elections provide the means to acquire political power and history teaches that some people (even if only a small percentage) are willing to violate the law to achieve political power. If men were angels, ballot boxes could be placed unattended on street corners. It is the role of election professionals to prevent the election process from being subverted to such corrupt ends.

Conducting fair and honest elections that protect the principle of "one person, one vote" involves three fundamental components: (1) a current and accurate voter roll on which eligible registered voters are correctly and accurately listed at the proper precinct,[6] and ineligible persons excluded; (2) verifying that the person casting a ballot is the person registered on the voter roll; and (3) accurately counting every lawfully cast ballot, and accurately and timely reporting the outcome.

The current case concerns the means by which Indiana election officials verify that the person casting a ballot is in fact the person on the voter roll. Requiring reliable voter identification also provides some assurance that the registered individual is indeed an eligible voter.

A. Voter Registration Fraud Occurs.

Maintaining a current and accurate voter roll is a constant challenge for election officials.[7] This is due to

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[6] Registering voters in the proper precinct ensures each voter has the opportunity to vote in the elections affecting that specific voter. Precinct-based voting also prevents multiple voting at different polling places. This Court upheld pre-election registration and precinct voting requirements as long ago as *Mason v. Missouri*, 179 U.S. 328, 335 (1900).

[7] When reasonable measures to confirm elegibility are not conducted before a name is added to the roll, it fosters fraudulent registrations. See Keith Erwin, *Potential Fraud Feared In Drive To Sign Up Voters*, SEATTLE TIMES, Feb. 23, 2007, at B1; Brad Shannon, *Fraud Alleged in 2004 Washington Voter-Registration*

(Continued on following page)

voters moving (within or between jurisdictions) without updating their voter registration, a voter's death,[8] or a voter becoming ineligible to vote based on a criminal conviction.[9]

Ineligible persons on voter rolls include those not citizens. A congressional task force found, for example, that there was "clear and convincing evidence that 748 invalid votes" by aliens were cast in a 1996 California congressional election.[10] A Utah study

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Drive, THE OLYMPIAN, June 23, 2007, at 1C; Keith Erwin, *Three Plead Guilty in Fake Voter Scheme*, SEATTLE TIMES, Oct. 30, 2007, at B5 (chronicling discovery of "the biggest voter-registration fraud scheme in Washington history" in which three persons plead guilty to submitting more than 1,800 fictitious voter-registration cards during a 2006 registration drive); *Questions Abound in Voter Push*, KANSAS CITY STAR, Oct. 12, 2006, at B1.

[8] Matt Wynn, *Deceased Still On State's Voting Rolls*, COLUMBIA MISSOURIAN, Nov. 2, 2006, at 1A (finding 10,520 deceased citizens remained registered in Missouri during 2004 election); Lisa M. Collins, *In Michigan Even the Dead Vote*, DETROIT NEWS, Feb. 26, 2006, at 1A.

[9] See *Hayden v. Pataki*, 449 F.3d 305 (2nd Cir. 2006) (*en banc*) (New York statutes disenfranchising felons not prohibited by Voting Rights Act); *United States v. Prude*, 489 F.3d 873 (7th Cir. 2007) (upholding conviction of defendant for fraudulently claiming eligibility to vote despite disqualifying felony conviction).

[10] H.R. 105-416, 105th Cong. at 12 (1998), see also John Fund, WALL STREET JOUR., OpinionJournal, May 21, 2006 at http://www.opinionjournal.com/diary/?id=110008411 (noting that "[s]everal California counties report that an increasing number of registered voters called up for jury duty write back saying they are ineligible because they aren't citizens").

found at least 129 registered voters who were deportable or "likely to be illegal aliens,"[11] while *The New York Times* recently noted that voting rolls in Arizona "include[] people who are ineligible to vote, like illegal immigrants and felons."[12] Following the 2004 general election, several people in Florida were charged and/or convicted of illegally voting and making false citizenship claims.[13] Indiana's population of illegal aliens was estimated in 2000 to be 45,000 – a 300% increase from 1990.[14] Indiana's Photo

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[11] See Letter from John M. Schaff, Utah Auditor General, to John L. Valentine, Utah State Senate President (Feb. 8, 2005), *available at* http://le/utah.gov/audit/05_01ilr.pdf.

[12] Randal C. Archibald, *Arizona Ballot Could Become Lottery Ticket*, N.Y. TIMES, July 17, 2006, at A1.

[13] See *U.S. v. Chaudhary, a/k/a Usman Ali*, No. 04-CR-00059 (N.D. Fla.); *U.S. v. Mohsin Ali*, No. 4-05-CR-47 (N.D. Fla.); *U.S. v. Velasquez*, No. 03-CR-20233 (S.D. Fla.) (involving a former candidate for the Florida legislature); *U.S. v. McKenzie*, No. 04-CR-60160 (S.D. Fla.); *U.S. v. Francois*, No. 04-CR-20488 (S.D. Fla.); *U.S. v. Exavier*, No. 04-CR-60161 (S.D. Fla.); *U.S. v. Lloyd Palmer*, No. 04-CR-60159 (S.D. Fla.); *U.S. v. Velrine Palmer*, No. 04-CR-60162 (S.D. Fla.); *U.S. v. Shivdayal*, No. 04-CR-60164 (S.D. Fla.); *U.S. v. Sweeting*, No. 04-CR-20489 (S.D. Fla.); *U.S. v. Lubin*, No. 04-CR-60163 (S.D. Fla.); *U.S. v. Bennett*, No. 04-CR-14048 (S.D. Fla.); *U.S. v. O'Neil*, No. 04-CR-60165 (S.D. Fla.); *U.S. v. Torres-Perez*, No. 04-CR-14046 (S.D. Fla.); *U.S. v. Phillips*, 04-CR-80103 (S.D. Fla.); *U.S. v. Bain Knight*, No. 04-CR-14047 (S.D. Fla.).

[14] U.S. Immigration and Naturalization Service, Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, at 15, Table 1 (Jan. 2003), *available at* http://www.uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf.

ID requirement addresses this problem, since Indiana requires proof of legal status before it will issue such identification. See 140 Ind. Admin. Code 7-4-1 to -3 (2006); Pet. App. 32-33.

Besides these sources of inaccuracies, recent elections have witnessed a substantial increase in voter registration fraud, which occurs when someone seeks to register a real person who is not eligible, an eligible voter multiple times in different jurisdictions, or a fictional person. In the 2004 Presidential election, Chad Staton was convicted in Ohio of submitting almost 100 fraudulent voter registration forms for, among others, Dick Tracy, Mary Poppins and Michael Jordan, for which he was reportedly paid in crack cocaine.[15] King County, Washington recently settled civil and criminal vote fraud charges against an organization for submitting a large number of fake or fraudulent voter registration cards.[16] The Senate debate on HAVA described the registration of a number of dogs as voters in States across the country.[17]

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[15] *State of Ohio v. Chad Staton*, No. 04-CR009020 (Defiance County, Ohio Oct. 22, 2004); *Man Arrested After Voter Forms Turned in For Mary Poppins, Michael Jordan, Ohio Officials Say*, THE ASSOCIATED PRESS, Oct. 19, 2004.

[16] See *Settlement & Compliance Agreement* (July 27, 2007) *available at* http://www.metrokc.gov/proatty/news/2007/Settlement%20and%20Compliance%20Agreement.pdf.

[17] See 148 Cong. Rec. S10489 (Oct. 16, 2004) (statement of Sen. Bond); see also Keith Erwin, *Woman Registers Her Dog to Vote; Prosecutors Growl*, SEATTLE TIMES, June 22, 2007, at B1.

Reports from across the country suggest the magnitude of such inaccurate and fraudulent registrations. Thus, it has been reported:

- that Detroit's voter rolls contain "as many as 20,000 dead people and roughly 100,000 wrong addresses";[18]
- that Florida had more than 64,000 dead people on its voter rolls in December 2004;[19]
- that 46,000 were illegally registered to vote in both Florida and New York City,[20] and 27,000 in both Florida and Ohio;[21]
- while an audit found that "nearly 10 percent, or 24,000 of [St. Louis'] registered voters, are either dead, [have] been convicted of a felony, [are] registered in another jurisdiction or [are] otherwise questionable."[22]

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[18] Lisa M. Collins, *In Michigan, Even Dead Vote*, DETROIT NEWS, Feb. 26, 2006, at 1A.

[19] Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, CHICAGO TRIBUNE, Dec. 4, 2004, at C13.

[20] Russ Buettner, *Exposed: Scandal of Double Voters*, N.Y. DAILY NEWS, Aug. 22, 2004, at 4.

[21] Scott Hiaasen, Dave Davis and Julie Carr Smyth, *Voters Double-Dip in Ohio, Fla.*, CLEVELAND PLAIN DEALER, Oct. 31, 2004.

[22] Doug Moore, *Auditor Criticizes Election Board*, ST. LOUIS POST-DISPATCH, May 26, 2004, at C4.

Indeed, the District Court noted that "[b]oth parties have submitted evidence in this case which indicates that Indiana's voter rolls are significantly inflated." Pet. App. 109.

Election officials work diligently and spend considerable resources seeking to maintain current and accurate voter rolls. However, as the foregoing demonstrates, this is a substantial undertaking and voter rolls are not always accurate.

Requiring that a person seeking to vote provide Photo ID will assure that the person on the roll is in fact a living, real person, and some assurance that that person is actually eligible to vote.

B. Vote Fraud at the Polling Place Occurs.

Regrettably, vote fraud is not a myth. The bipartisan Carter-Baker Commission concluded that "there is no doubt" that in-person voting fraud occurs; "[i]n close or disputed elections, * * * a small amount of fraud could make the margin of difference."[23]

America has an unfortunate history of vote fraud, and much of this fraud is conducted at the polling

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[23] Commission on Federal Election Reform, *supra* n. 2, at 18.

place.[24] In *Deliver the Vote: A History of Election Fraud,* Professor Tracey Campbell sums up this history:

> [W]e must * * * confront the uncomfortable truth that election fraud has been a common component of our nation's electoral history, and, in the aggregate, undermines the only check that the people have over their leaders. This fundamental threat to our democratic birthright must no longer be dismissed by partisan finger-pointing * * *.[25]

William Marcy "Boss" Tweed famously said, "I don't think there was ever a fair or honest election in the City of New York."[26] Corrupt machine politics and

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[24] President Carter's book TURNING POINT (1995) recounts the massive vote fraud he experienced in his first run for the Georgia State Senate; Carter was declared the victor only following litigation and a recount revealing this substantial fraud.

Professor Robert Pastor, a Carter-Baker Commission member and former Carter Administration official, has testified to his own disenfranchisement when he was informed someone had voted in his name before he appeared at the polls. *Hearing before the U.S. Comm'n on Civil Rights*, 111-18 (Oct. 13, 2006).

[25] Tracy Campbell, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION – 1742-2004, at 340 (2005). See also, John Fund, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004).

[26] Andrew Gumbel, STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA 74-75 (2005). Voter impersonation was a device favored by Boss Tweed's machine: "[r]epeaters," often felons, were "given five dollars, as much liquor as they could hold, and a list of the recently

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vote fraud are a commonplace in the nation's past; Indiana has its own notorious history of such practices.[27] The margin of victory in presidential elections has been within the number of votes that were suspected of being obtained by fraud.[28]

Amici do not suggest that America's present election system is characterized by large-scale vote

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deceased whose names they were to use to cast as many ballots as possible. 'Vote early and often' was Tammany's much vaunted maxim, and that was exactly what these men intended to do." *Id.*

[27] As far back as the 1880s, Indiana was known for election fraud. See Campbell, *supra* n. 25, at 95 (describing the use of "floaters" – people voting multiple times – in Indiana in the 1888 presidential election; "[b]y the late 1880s, Indiana had acquired a notorious reputation in the annals of electoral corruption * * * ."). In a nationally prominent scandal in 1914, federal authorities prosecuted 114 people for an election fraud scheme in Terre Haute that included fraudulent voter registrations that allowed some individuals to vote as many as 22 times. See *id.* at 147-49. More recently, the Indiana Supreme Court invalidated the 2003 mayoral primary in East Chicago because of an absentee-ballot fraud scheme. See *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004).

[28] Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 39-40 (2001). "Because of extensive vote fraud by Democrats as well as Republicans, it is uncertain whether Tilden really did win the popular vote [in the 1876 presidential election]." *Id.* at 39. In other elections the suspected vote fraud may not have been sufficient to change the outcome, but nevertheless undermined public confidence in the honesty of the election process. *Id.* at 40 (noting that "[t]here were serious allegations of fraud by Democrat election officials in Illinois and Texas" in John F. Kennedy's 1960 election).

fraud like the machine politics of yore. The fact that vote fraud is less prevalent today than in the days of Boss Tweed is the result of reforms that have improved our election process. But election reform (such as that proposed by the Carter-Baker Commission and adopted by HAVA) is a continuing process.

Vote fraud is not, unfortunately, merely of historical interest. Vote fraud, including fraud practiced at the polling place remains a feature of recent American elections. The Carter-Baker Commission provided several recent examples:

> The November 2004 elections [] showed that irregularities and fraud still occur. In Washington, for example, where Christine Gregoire was elected governor by a 129-vote margin, the elections superintendent of King County testified during a subsequent unsuccessful election challenge that ineligible ex-felons had voted and that votes had been cast in the names of the dead. * * * In Milwaukee, Wisconsin, investigators said they found clear evidence of fraud, including more than 200 cases of felons voting illegally and more than 100 people who voted twice, used fake names or false addresses, or voted in the name of a dead person. * * * By one estimate, for example, there were over 181,000 dead people listed on the voter rolls in six swing states in the November 2004 elections,

including almost 65,000 dead people listed on the voter rolls in Florida.[29]

The District Court noted that Indiana considered the experience of other States when adopting its voter identification law, Pet. App. 109, as it was fully entitled to do. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Specifically, Indiana considered Missouri's experience with vote fraud. That experience is instructive.

The "Pendergast Machine" in Kansas City so institutionalized vote fraud in Missouri that the 1999-2000 *Official Missouri State Manual* (published by Democrat Missouri Secretary of State Rebecca Cook) describes its practices in detail.[30] Missouri's other major city, St. Louis, likewise has a "miserable tradition" of vote fraud.[31]

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[29] Commission on Federal Election Reform, *supra* n. 2, at 4.

[30] "Pendergast's ability to turn out the vote was phenomenal. Not only did many of the poorest people in Kansas City vote regularly, but did so frequently at each election. Indeed, in some wards voter turnout often approached one hundred percent, when it did not exceed it. Even more miraculously, the dead would rise at each election in numbers that would astonish an expectant Christian." *Missouri's Most Important Politician*, 1999-2000 OFFICIAL STATE MANUAL 36-39.

[31] Editorial, *Miserable Tradition*, ST. LOUIS POST DISPATCH, Dec. 11, 2000, at B2. For a more detailed summary of Missouri's longstanding history of vote fraud, see, Mark F. (Thor) Hearne II, *The Missouri Voter's Protection Act – Real Election Reform for All Missouri Voters*, ST. LOUIS LAWYER (June 2006).

The 2000 Presidential election in St. Louis became a matter of national attention (and local embarrassment).[32] The *Los Angeles Times* noted that in St. Louis,

> [t]he dearly departed seem to have quite a constituency around here. At least three dead aldermen registered to vote in Tuesday's mayoral primary. So did one alderman's deceased mother. And, a dead man was listed as the chief plaintiff in a lawsuit filed on election day last November. He was having trouble voting, the suit said, due to long lines at his polling station. So he petitioned a judge – successfully – to keep city ballot boxes open late.[33]

Both Democrat Secretary of State Cook and her Republican successor investigated the election; both found significant instances of vote fraud and irregularities.[34]

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[32] For a more detailed account of the St. Louis 2000 election see Bruce Ashton, *Dead Man Voting*, THE RIVERFRONT TIMES, Apr. 4, 2002; *The Florida Election Debacle: Can it Happen in Missouri?*, JOUR. OF THE MISSOURI BAR, Nov.-Dec. 2001, at 294-300.

[33] Stephanie Simon, *In St. Louis, Dead Are Causing Lively Debate with Their Votes*, LOS ANGELES TIMES, February 28, 2001, at A1.

[34] Of the 1,366 votes cast by affidavit in St. Louis that Secretary Cook reviewed, she concluded that "135 people who were not registered to vote were permitted to vote at a polling place without a court order and without apparent authorization from [Election] Board Officials." Report by Secretary of State

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Vote fraud continues to be a concern in other States as well. Thus,

- The *Detroit News* reported that, "[a]cross Michigan, 132 people were listed as having voted in November [2005]'s local elections although they had recently died * * * ."[35]
- *The New York Daily News* reported that between 400 and 1,000 voters registered in both Florida and New York City had voted twice in at least one election.[36]
- In September 2004, the *Kansas City Star* reported that more than 300 people may have voted twice in the same election in Missouri in 2000 and 2002, and the number "could be even higher."[37]

Rebecca McDowell Cook, *Analysis and General Recommendation Report Regarding the November, 2000 General Election in the City of St. Louis* 8-9 (Jan. 4, 2001); see also Report by Secretary of State Matt Blunt, *Mandate for Reform: Election Turmoil in St. Louis* (July 2001).

[35] Collins, *supra* n. 18, at 1A.

[36] Buettner, *supra* n. 20, at 4.

[37] Greg Reeves, *One Person, One Vote? Not Always*, KANSAS CITY STAR, Sept. 5, 2004, at A1. Two people plead guilty to voting in both Kansas and Missouri in the 2000 and 2002 federal elections. *U.S. v. Scherzer*, No. 04-CR-00401 (W.D. Mo.); *U.S. v. Goodrich*, No. 04-CR-00401 (W.D. Mo.). Two others were charged with voting at two different Missouri locations. *U.S. v. Jones*, No. 05-CR-00257 (W.D. Mo.); *U.S. v. Martin*, No. 05-CR-00258 (W.D. Mo.).

- The *Denver Post* reported in March 2005 that "[h]undreds of Coloradans are being investigated for voter fraud in the November [2004] elections. Prosecutors in at least 47 counties are probing cases involving accusations of forged signatures, felons voting or people who attempted to vote twice."[38]

- It was reported in January 2005 that the FBI and U.S. Attorney's office were investigating 59 cases of double voting in Duval County, Florida.[39] In Broward County, officials referred at least 30 cases of suspected double voting to law enforcement.[40]

- A joint federal-local law enforcement task force in Milwaukee found "clear evidence of fraud in the [Nov. 2, 2004] election," including hundreds of felons voting and "more than 100 individual instances of suspected double-voting, voting in names of persons who likely did not vote, and/or voting in names believed to be fake"; the task force also discovered the number of votes counted in Milwaukee exceeded the number of persons

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[38] Susan Greene & Karen E. Crummy, *Voter Fraud Probed in State Double Dippers*, DENVER POST, Mar. 24, 2005, at A-01.

[39] David DeCamp, *Double Voting Being Investigated*, FLA. TIMES-UNION, Jan. 25, 2005, at B-1.

[40] Amy Sherman, *Double-Voters' Names Going to Prosecutors*, MIAMI HERALD, Nov. 14, 2004, at 5B.

> recorded as voting by 4,500.[41] The U.S. Attorney later downplayed notions of a "massive conspiracy" but charged 18 people with felonies, including four cases of "double voting."[42]

As the district court noted, "without a photo identification requirement it is nearly impossible to detect in-person voter impersonation." See Pet. App. 109; see also *id.* at 7-8. Thus, the number of prosecutions, convictions, or documented reports of in-person vote fraud undoubtedly *under*represents the actual incidence.[43]

While perhaps not as widespread as in the past, regrettably the types of vote fraud practiced by "Boss" Tweed and the "Pendergast Machine" are still a very real concern for election officials. Requiring "a person" to provide reliable identification, to confirm they

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[41] *Preliminary Findings of Joint Task Force Investigating Possible Election Fraud*, DEPT. OF JUSTICE, May 10, 2005; Greg Borowski, *Inquiry Finds Evidence of Fraud in Election: Cast ballots outnumber voters by 4,609*, MILWAUKEE JOUR. SENT., May 11, 2005, at 1A (citing the newspaper's own investigation revealing 278 felons who illegally voted after reviewing only 38% of statewide ballots).

[42] Steve Schultze, *No Vote Fraud Plot Found*, Milwaukee Journal-Sentinel, Dec. 6, 2005, at A1.

[43] Milwaukee provides a concrete example: a task force found "widespread record keeping failures" that would create "difficulties proving criminal conduct beyond a reasonable doubt in a court of law." See *supra* n. 41. The U.S. Attorney lamented that "I don't know how you are going to prove a case when there is no paper trail." Schultze, *supra* n. 42, at A1.

are in fact the eligible voter listed on the roll, is a common-sense safeguard against these vote fraud schemes, which disenfranchise lawful voters and undermine public confidence in the legitimacy of an election's outcome.

III. Photo ID Requirements Enjoy Broad Bi-Partisan Support.

Although Petitioners claim that the purpose behind Indiana's Photo ID law is improperly partisan, *e.g.*, Dem. Br. 17-19, 39-40, the fact is that a nation-wide bi-partisan consensus has emerged in favor of Photo ID as a reasonable confidence-building, fraud-prevention measure.

A. The Bi-Partisan Carter-Baker Commission Recommended a Photo ID Requirement Stricter than Indiana's.

In the aftermath of the 2000 election, Presidents Carter and Ford co-chaired a bi-partisan commission (the Commission on Federal Election Reform) that investigated the conduct of federal elections and recommended changes in election administration.

Responding to these recommendations, Congress passed the Help America Vote Act of 2002 ("HAVA")[44] with broad bi-partisan support. HAVA was intended

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[44] Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C. § 15481).

to "change the system to make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (2002) (statement of Sen. Bond). The legislation's "one central goal [] was to make it easier to vote in America and much harder to corrupt our Federal election system." *Id.* at S2527 (statement of Sen. Dodd).[45]

HAVA demonstrated bi-partisan recognition of the three principles essential to any fair and honest election: (1) a current and accurate voter roll; (2) safeguards to assure that the person casting a ballot is reliably identified as the individual registered; and (3) accurate and unbiased procedures to properly count and report each vote cast.

Among other things, HAVA Section 15483(a)(5)(A)(ii) was specifically included to address vote fraud, and provides minimum requirements for identification of voters who register by mail, including presentation of photographic identification.[46] Although HAVA requires

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[45] President Bush noted that the Carter-Ford Commission's recommendations "helped inspire this legislation"; "our nation is grateful for their work on election reform and for all they have given to America." Remarks by President at Signing of H.R. 3295, The Help America Vote Act of 2002, October 29, 2002, 2002 WL 31415995 (White House).

[46] See, Hearing on H.R. 3295 Before the H. Comm. on the Judiciary, 107th Cong. (2001), available at 2001 WL 1552086 (F.D.C.H.) (statement of Rep. F. James Sensenbrenner, Jr.) (identifying vote fraud as a significant motive behind HAVA's anti-fraud provisions); Remarks by President Bush at Signing of H.R. 3295, Help America Vote Act of 2002 (Oct. 29, 2002), 2002 WL 31415995 (White House), at *2.

photographic identification for persons casting a ballot for the first time following a mail-in registration, Section 15483(a)(5)(A)(ii) also provides non-Photo ID alternatives, including "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."

These identification standards are a "floor," not a "ceiling." HAVA explicitly provides that the relevant provisions "are minimum requirements," and shall not "be construed to prevent a State from establishing election technology and administration requirements that are more strict," "so long as such State requirements are not inconsistent with the Federal requirements." 42 U.S.C. § 15484 (2006).

The Carter-Baker Commission was convened after the 2004 presidential election. This Commission was the successor to the Carter-Ford Commission and included many of the same members. The Carter-Baker Commission's Final Report represents a high-water mark in the development of national, bi-partisan, consensus recommendations on post-HAVA election reform.

Among its other recommendations, the Commission wrote that,

> [t]o ensure that persons presenting themselves at the polling place are the ones on the

> registration list, the Commission recommends that states require voters to use the REAL ID[47] card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), a photograph, and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to non-drivers free of charge.[48]

Notably, the Carter-Baker Commission's bi-partisan Photo ID recommendation is more stringent than Indiana's, requiring validation of provisional ballots within 48 hours of an election, J.A. 143, as opposed to Indiana's 10-day validation period.

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[47] The Federal REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified in scattered sections of 8 and 49 U.S.C. § 30301) established requirements that States must meet by 2008 for the issuance of photo identification that will be necessary to enter a federal building, board a plane or open a bank account. § 202, 119 Stat. at 312.

[48] Comm. on Federal Election Reform, *supra* n. 2, at 18-21.

Besides the Co-Chairs, this recommendation was supported by Commissioners Robert Pastor, Betty Castor, Rita Dimartino, Lee Hamilton, Kay Coles James, Benjamin Ladner, David Leebron, Nelson Lund, Shirley Malcom, Bob Michel, Susan Molinari, Robert Mosbacher, Ralph Munro, Jack Nelson, Tom Philips, and Sharon Priest. Commissioners Tom Daschle, Spencer Overton, and Raul Yzaguirre dissented.

B. Photo ID Requirements Are Broadly Supported by Voters Themselves.

Requiring a voter to identify himself or herself with Photo ID enjoys broad, consistent, bi-partisan public support.[49] Nationally, an April 2006 Wall Street Journal/NBC poll found that more than 80% of U.S. citizens support the requirement that a person show a Photo ID before voting.[50] This included the support of an overwhelming majority of Democrats, Republicans and members of minority communities.

When the Photo ID issue is placed on the ballot, it receives strong bi-partisan support. Albuquerque voters, with the support of Hispanic Democrat Mayor Chavez, adopted a Photo ID requirement for all Albuquerque elections.[51] In Arizona voters passed a

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[49] While this consistently strong, bi-partisan support does not decide the constitutional issues, it counters Petitioners' claim of improperly partisan motives, and confirms that Photo ID requirements will increase public confidence in the integrity of the election process.

[50] See NBC/WALL-STREET JOUR. SURVEY, *available at* http://online.wsj.com/public/resources/documents/poll20060426.pdf (62% "strongly favored" Photo ID requirement, while an additional 19% "mildly favored" it).

[51] Polling showed photo ID with overwhelming support "among Republicans and Democrats, Anglos and Hispanics and across income levels" in Albuquerque; a pre-election poll showed the measure supported by a 77 to 17% margin, including 92% of Republicans and 66% of Democrats. Dan McKay, *Voter Picture ID Has Wide Support*, ALBUQUERQUE JOUR., Aug. 24, 2005, at A1. Albuquerque Mayor Martin Chavez, a Democrat, endorsed the measure, emphasizing that "[i]ntegrity of the voting process is essential." Jim Ludwick, *Critics: Mail-in Voters Should Show ID,*

(Continued on following page)

popular state-wide initiative (Proposition 200) that required prospective voters to present proof of citizenship before registering to vote.[52]

Voter identification requirements – including Photo ID requirements – have emerged as a national consensus.[53] When the issue has been placed before voters, it enjoys overwhelming, consistent, bipartisan support.

C. At Least Seven States Require Some Form of Photo ID.

More than 24 states currently require every voter to provide identification before casting a ballot;[54] according to the National Conference of

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Too, ALBUQUERQUE JOUR., Sept. 12, 2005, at A1. Election officials reported that "the rule change didn't cause any problems" when first implemented. *New ID Rule Passes Test*, ALBUQUERQUE JOUR., Nov. 16, 2005, at B1.

[52] See *Lawsuit Off Base In Challenging Voter ID Rules*, ARIZ. DAILY STAR, May 15, 2006, at A6. This is the measure at issue in *Purcell v. Gonzalez*, 549 U.S. ___, 127 S. Ct. 5 (2006) (per curiam).

[53] See also *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127 (2005); Michael Barone, Web Blog, *Message to the Secretaries of State: 1679 and 2006*, U.S. NEWS AND WORLD REPORT, Feb. 6, 2006 at http://www.usnews.com/blogs/barone/2006/2/6/message-to-the-secretaries-of-state-1679-and-2006.html (remarks at meeting of the National Association of Secretaries of State).

[54] See *Requirements for Voter Identification, Nat'l Conf. of State Legislatures* (Feb. 1, 2007) at http://www.ncsl.org/programs/legismgt/elect/taskfc/VoterIDReq.htm.

(Continued on following page)

State Legislatures, of these 24, seven require some form of Photo ID.[55]

Among the jurisdictions requiring federal preclearance under Section 5 of Voting Rights Act, 42 U.S.C. § 1973c, the U.S. Department of Justice has approved voter identification requirements in

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For a more detailed discussion of the voter identification requirements in the various states, see Brief of Texas, *et al.* as *Amici Curiae* Supporting Respondents.

[55] Florida, Georgia, Hawaii, Indiana, Louisiana, South Dakota and Ohio. *Id.* In addition, the Michigan Supreme Court recently upheld that State's Photo ID requirement against federal and State constitutional attack. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 43, 740 N.W.2d 444, 467 (Mich. 2007) ("whether the incidence of in-person voter fraud is believed to be rare or frequent, the fact of the matter is that no voter identification was required before the enactment [of the Photo ID law] and no one knows – or could possibly know – the frequency with which in-person voter fraud occurs at the polls. More relevant to our constitutional inquiry is the fact that a legislature – particularly one given a constitutional mandate to 'preserve the purity of elections' – is not required to wait for an electoral calamity before it may act to fulfill its obligation to preserve."). Arizona's Photo ID requirement is the subject of litigation which has reached this Court. *Purcell v. Gonzalez*, 549 U.S. ___, 127 S. Ct. 5 (2006) (per curiam).

Missouri also enacted Photo ID legislation, which was declared unconstitutional by the State's Supreme Court solely under the purportedly "more expansive," "greater protection" of voting rights under the *state* constitution. *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006).

Virginia, Georgia, Arizona and New Mexico. Georgia's Photo ID requirement was approved twice.[56]

There are of course differences among the various States' laws, and none are precisely identical to Indiana's. However, the legislation adopted in multiple States demonstrates that the principle of requiring a voter to provide some form of reliable identification (generally a government-issued Photo ID) enjoys broad support.

D. Numerous Other Countries Require Some Form of Photo ID.[57]

The interest in conducting honest elections, and concerns over vote fraud, are not unique to the United States. Former President Carter is often called upon to visit other nations and observe the conduct of their elections, or to recommend measures

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[56] See, *e.g.*, U.S. Department of Justice, Letter to Sen. Bond, Feb. 26, 2002, at http://www.usdoj.gov/crt/voting/hava/bond_ ltr. htm ("Far from automatically violating Section 5, identification requirements can be an efficient and effective means of combating voter fraud.").

[57] *Amici* do not suggest that the election practices of other nations determine whether a specific measure passes muster under the United States Constitution. Rather, the widespread adoption of Photo ID requirements, as a means to prevent vote fraud and assure the integrity of the election process, shows this is an internationally recognized "best practice."

that other nations can take to safeguard the integrity of their election process.[58]

The Carter-Baker Commission noted that "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement of their rights."[59] Mexico, for example, requires strict voter identification to assure voter confidence in a fair and honest election.

> Mexico spends much more than the U.S. on measures to prevent vote fraud. All voters in Mexico must present voter IDs at the polls, which include not only a photo but also a thumbprint. The IDs themselves are essentially counterfeit-proof, with special holographic images, imbedded security codes, and a magnetic strip with still more security information. As an extra precaution, voters' fingers are dipped in indelible ink to prevent them from voting multiple times.[60]

Observers have noted that these strict voter registration and identification requirements have done nothing to suppress turnout: "in the three presidential elections Mexico has conducted since the

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[58] Commission for Federal Election Reform, *supra* n. 2, at 5.

[59] *Id.*

[60] John R. Lott, Jr. & Maxim C. Lott, *Look South: Americans could learn from Mexican elections*, NATIONAL REVIEW ONLINE, July 6, 2006, at http://article.nationalreview.com (also noting that Mexican voters are required to appear in-person both to apply for Photo ID card, and to receive the issued card).

National Election Commission reformed the election laws '68% of eligible citizens have voted, compared to only 59% in the three elections prior to the rule changes.' People are more likely to vote if they believe their ballot will be fairly counted."[61]

IV. Requiring Photo ID Increases Public Confidence, and Increased Public Confidence Increases Participation.

This Court has held that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits," a direct restriction on political expression. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 143 (2003). Even in that context – where the exercise of individual rights is directly and significantly curtailed – the Court has recognized that "the appearance of undue influence * * * 'could jeopardize the willingness of voters to take part in democratic governance.'" *Id.* at 144 (citation omitted).

Thus, even apart from the use of Photo ID requirements to prevent *actual* vote fraud, the fact that such requirements will increase public confidence in the integrity of the election process provides a separate justification for such measures.

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[61] John Fund, OpinionJournal, *How to Run a Clean Election, What Mexico can teach the United States*, WALL STREET JOUR., July 10, 2006, at http://www.opinionjournal.com/diary/?id=110008630.

Increasing public confidence in the election process was one of the primary motivations for the Carter-Baker Commission's recommendations. As the Commission noted,

> Elections are the heart of democracy. They are the instrument for the people to choose leaders and hold them accountable. At the same time, elections are a core public function upon which all other government responsibilities depend. If elections are defective, the entire democratic system is at risk. Americans are losing confidence in the fairness of elections, and while we do not face a crisis today, we need to address the problems of our electoral system.
>
> Our Commission on Federal Election Reform was formed to recommend ways to raise confidence in the electoral system.[62]

The test of our nation's election system is not found in landslides, but when the outcome turns upon a handful of votes. As this Court and our nation found in 2000, even the presidency can be decided by several hundred votes. That election was not unique. In 2006, control of the United States Senate was decided by less than 4,000 votes: the margin of victory in the Montana and Virginia Senate races was 3,562, and 9,329, respectively; control of the Senate turned upon the outcome of either race. A number of Congressional

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[62] Commission on Federal Election Reform, *supra*, n. 2, at ii.

races were similarly determined by several hundred votes. In 2004 Washington State experienced a several month ordeal during which the outcome of their Governor's race was decided in the course of three recounts by a margin of 129 votes.[63]

The point is, vote fraud need not be massive to undermine an election's outcome. Several hundred, or several thousand, votes can determine the Presidency, control of Congress, or state-wide races.

V. Clear and Uniform Photo ID Requirements Facilitate Expeditious, Consistent Processing of Voters at the Polls.

The conduct of American elections depends to a significant degree upon the participation of tens of thousands of poll workers, who generally serve on a volunteer (or nominally compensated) basis, and who are not full-time government employees. There is limited opportunity to train these civic-minded election workers.

Some States allow voters to simply identify themselves at the poll; unless challenged, this self-identification is self-validating. In other States, voters are merely required to sign a voter register (leaving it to inexpert poll workers to then compare that signature to one on file). In still other States, existing laws permit voters to appear with a veritable

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[63] *Id.* at 4.

smorgasbord of forms of identification, singly or in combination: utility bills; (government or private) checks made payable in their names (with or without addresses); Social Security cards; bank statements; or employer-, military-, or school-issued identification.[64]

This multitude of identification alternatives can create confusion for poll workers – and for voters. The result is delays in processing voters prior to issuing them a ballot, and the significant potential for inconsistent treatment of voters between polling stations, and even between poll workers at a single location.

A uniform standard of reliable identification readily and freely accessible to all eligible voters, such as Indiana's Photo ID requirement, eliminates this confusion by imposing a single standard familiar to poll workers and voters alike. As noted by the State Respondents (Br. at 25), virtually every eligible voter already possesses such identification; the requirement to present it to verify identity is commonplace. See Pet. App. 3, 108. The result of imposing a uniform Photo ID requirement is more expeditious, consistent and fair processing of all eligible voters, which furthers the aim of instilling public confidence, and encouraging the widest possible participation.

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[64] See Brief of Texas, *et al.* as *Amici Curiae* Supporting Respondents (cataloguing voter identification requirements in the States).

VI. There Is no Evidence Indiana's Photo ID Requirement Disenfranchises Lawful Voters.

As the State Respondents note (Br. at 24), neither the Petitioners in this case – nor the plaintiffs in other challenges to Photo ID requirements – have identified a *single* voter who would be prevented from voting by operation of the identification requirements. This is hardly surprising, given the ubiquity of photo identification in modern society, plus the provisions of laws like Indiana's which allow voters to exercise the franchise even without Photo ID through reasonable accommodations such as provisional balloting. *E.g.*, Ind. Code §§ 3-11.7-5-1, -5-2.5(c) (permitting indigents and religious objectors to validate provisional ballots by executing affidavit at county clerk's office within 10 days of election).

Further, the State Respondents (Br. 31-35) persuasively demonstrate that there is no competent evidence to suggest a disparate impact on racial minorities, the indigent, the elderly, or any other identifiable sub-group – indeed, the only Indiana-specific study of the Photo ID law's effects concludes that "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated populations suffer any reduction in voter turnout relative to other counties."[65]

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[65] Jeffrey Milyo, TRUMAN INST. OF PUB. POLICY, Report No. 10-2007, *The Effects of Photographic Identification on Voter*

(Continued on following page)

Following the 2006 mid-term elections, Dan Seligman of the non-partisan Electionline.org organization[66] testified that,

> On voter I.D., new rules and pre-election court challenges to new voter I.D. laws in Indiana, Ohio, and Georgia did not cause significant problems in the polls. Indiana's new photo-only voter I.D. law did not hinder those voters that showed up at the polls, at least according to Indiana's Secretary of State, and an independent organization that ran hotlines for voters reported that only a small percentage, under seven percent, of election day complaints focused on voter I.D. issues. * * * Scattered issues aside and not straying into the debate about whether voter I.D. secures the vote or blocks access to it, voter I.D. requirements did not seem to pose

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Turnout in Indiana: A County-Level Analysis (Nov. 2007), *available at* http://truman.missouri.edu/uploads/Publications/Report%2010-2007.pdf. See also Michael Alvarez, Delia Bailey, Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout*, CAL. INST. OF TECH., Soc. Science Working Paper 1267 (Oct. 2007).

[66] "Electionline, previously known as the Election Reform Information Project, was established after the 2000 election by a few charitable trusts as a nonpartisan and, most importantly, non-advocacy clearinghouse of news analysis data on election reform information. We're solely funded by the [Pew] charitable trusts and a grant administered by the University of Richmond." Testimony of Dan Seligman, Editor electionline.org, Before the U.S. Election Assistance Comm'n (Dec. 7, 2006) at 200-01.

> a stumbling block on election day to those voters who came to polling places.[67]

Balanced against the significant public interest in election integrity and voter confidence which effective voter identification requirements serve, the lack of *any* credible evidence of voter disenfranchisement or disparate impact on particular sub-classes mandates the rejection of Petitioners' challenges, and affirmance of the judgment below.

CONCLUSION

Amici believe that requiring a person to provide Photo ID before casting a ballot, when that identification is free and reasonably accessible to all eligible voters, is a "best practice" that will work to prevent vote fraud and increase public confidence in the election process. Indiana's Photo ID law is consistent with this "best practice," and *amici* accordingly urge the Court to affirm the judgment below.

Respectfully submitted,

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[67] *Id.* at 207-08.

APPENDIX

BIOGRAPHICAL INFORMATION ON INDIVIDUAL *AMICI*

Bob Michel, served as a member of the U.S. House of Representatives from Illinois from 1957 to 1993. During that time he held a number of leadership roles, including those of Minority Whip and Minority Leader. Congressman Michel was a member of the Carter-Ford Commission on Election Reform and the Carter-Baker Commission on Election Reform. President Bush acknowledged Congressman Michel's contribution to election reform at the White House ceremony when President Bush signed HAVA. "Although Gerald Ford and Jimmy Carter could not be here today, our nation is grateful for their work on election reform and for all they have given to America. We're pleased, however to be joined by the co-chairman of the commission, former Congressman Bob Michel of Illinois, former Presidential Counselor Lloyd Cutler." Remarks by President at Signing of H.R. 3295, The Help America Vote Act of 2002, October 29, 2002.

CURRENT OR FORMER SECRETARIES OF STATE

Mary Kiffmeyer was elected Minnesota's Secretary of State and served in this capacity from 1999 to 2006. Ms. Kiffmeyer was responsible as Minnesota's chief election officer for overseeing the administration of all state and federal elections, involving more than 20,000 election judges, and 4,000 polling places. A particular challenge was to administer elections

under Minnesota's same-day registration law, which Ms. Kiffmeyer believes only highlighted the need to reliably verify voter identity. In 2004 Ms. Kiffmeyer served as President of the National Association of Secretaries of States, and has served as a Member of the Advisory Board of the U.S. Election Assistance Administration ("EAC"), an independent federal agency created under the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C. § 15481) ("HAVA"). Secretary of State Kiffmeyer is a Republican.

DEMOCRAT AND REPUBLICAN INDIANA ELECTION CLERKS AND CURRENT AND FORMER PRESIDENTS OF THE INDIANA CLERKS ASSOCIATION

Sarah M. Taylor served two terms as the Clerk of Marion County, Indiana between January 1995 and December 2002. During this time Ms. Taylor was responsible for the administration of elections for 917 precincts and 520,000 registered voters in Indianapolis, Indiana. Ms. Taylor served as the facilitator for the Vote Indiana Team established by the Indiana Secretary of State's office, charged with developing a state plan to qualify for $50 million in federal election-improvement funding authorized by HAVA. Ms. Taylor also served as President of the Association of Clerks of the Circuit Courts of Indiana in 2001. Ms. Taylor is a Republican.

Dale Brewer has served since 2000 as the Clerk of Porter County, Indiana, and previously served on the County's Election Board. Ms. Brewer is current President of the Association of Clerks of the Circuit Courts of Indiana, and has previously served on its Legislative Committee. Before that Ms. Brewer was an election precinct official and election judge. Ms. Brewer has served on recount commissions. Mr. Brewer is a Republican.

Lynne Spevak served as the Clerk of La Porte County, Indiana from 1998 through 2005. Ms. Spevak served as President of the Association of Clerks of the Circuit Courts of Indiana in 2004. Ms. Spevak served as a member of the U.S. Election Assistance Commission Standard Board in 2004 and 2005. Ms. Spevak is a Democrat.

Shelly Hiatt Parris is the current Clerk of Sullivan County Indiana. Ms. Parris has served as clerk of Sullivan County from 1980 until 1988. Ms. Parris again served as clerk from July 2000 until December 2007 when her current term expires. Ms. Parris is a past President of the Association of Clerks of the Circuit Courts of Indiana. Ms. Parris is a Democrat.

Linda J. Grass was Clerk of Hancock County Indiana from 1999 through 2006. Ms. Grass was President of the Association of Clerks of the Circuit Courts of Indiana in 2005, and was Indiana "Clerk of the Year" in 2001. Ms. Grass is a Republican.

OTHER LOCAL ELECTION OFFICIALS

Wesley R. Kliner, Jr. served as a Commissioner of the Hamilton County, Tennessee Election Commission from 2001 to 2003, and a Commissioner of the Tennessee State Election Commission from 2003 to 2005. Mr. Kliner has served on the EAC's Board of Advisors since 2004, and presently serves as its Vice-Chair.

Harry W. MacDougald has served on the Fulton County, Georgia Board of Registration since 2002. In the period immediately preceding the 2004 presidential election, Fulton County election officials faced a significant number of fraudulent or otherwise problematic registration applications, which in Mr. MacDougald's view highlighted the need for stricter identification requirements for registration and voting. See *Common Cause/Ga. v. Billups*, 406 F. Supp.2d 1326, 1347 (N.D. Ga. 2005) (describing MacDougald affidavit reporting questionable voter registrations).

Susan Sautermeister presently serves as the Election Commissioner for District One in Madison County, Mississippi. Ms. Sautermeister has 17 years' experience as a county or municipal election commissioner, is a past President of Mississippi's Election Commissioners' Association, and has served as a consultant on election fraud and ballot security issues. She presently serves as a member of the EAC's Board of Advisors.

STATE LEGISLATORS WITH ELECTION EXPERIENCE

Senator Delbert L. Scott represents Missouri's 28th Senate district. Senator Scott serves as Chairman of the Senate Financial, Governmental Organizations, and Elections Committee with jurisdiction of Missouri Election law. Senator Scott was sponsor of the Missouri Voter Protection Act, which adopted a wide range of election reforms recommended by the Carter-Baker Commission, including a provision for persons to provide photo identification before casting a ballot. Senator Scott is a Republican.

AMICUS CURIAE BRIEF

NOS. 07-21 & 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
PETITIONERS,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
RESPONDENTS.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
PETITIONERS,

v.

TODD ROKITA, *ET AL.*,
RESPONDENTS.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF PETITIONERS

[PHOTO ID LAW VIOLATES PRIVACY]

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November 13, 2007

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amici* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*; 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

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SUMMARY OF THE ARGUMENT

The Indiana statute does not remedy the risk of voter fraud, but mandating presentation of state-issued documents as a condition to the exercise of the right to vote—unquestionably the most fundamental of all democratic freedoms[2]—is a sharp departure from national precedent and raises unique privacy and security concerns. Other *amici* have noted that race, politics and religion often drive the deployment of ID cards, a concern shared by EPIC.[3] However, this brief addresses the specific privacy and security concerns that arise from the Indiana voter ID law.

First, the Indiana law ostensibly seeks to address the problem of voter fraud through the

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[2] "Other rights—even the most basic—are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

[3] Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) In Rwanda, despite protests from non-governmental organizations several years prior to the genocide, official identification cards contained ethnic information. The classification system was a remnant from the Belgian colonial government, and was extensively used to identify victims to be killed. To have the word "Tutsi" on an identification card was a death sentence. During the Holocaust, Nazi Germany placed a "J-stamp" on the identification cards of all Jews. Requiring citizens to present non-voting-related documents, such as a driver's license, at voting polls or should they not own one, requiring them to disclose to the state their reason for non-compliance (which can include religious beliefs) is akin to demanding citizens to present government-issued food-rationing cards for unrelated purposes, a practice that prompted rebellion in World War II Britain. EPIC & Privacy Int'l, PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS(EPIC 2006) 23 (EPIC 2006).

establishment of photo requirement at the polling place, yet leaves open the ongoing risk of fraud made possible by absentee voting. As a matter of logic, the identification requirement is flawed. Second, the state voter ID law will almost certainly rely upon the federally mandated REAL ID, a controversial system of identification that will introduce additional privacy and security risks.

ARGUMENT

I. The Indiana Voter ID System Is Flawed And Does Not Ensure That Eligible Voters Will Be Allowed To Vote Or That Ineligible Voters Will Be Prevented From Voting

Any identification system will involve multiple layers of complex and interdependent systems that must work well when joined for the purpose of determining eligibility to vote. IDs—NOT THAT EASY QUESTIONS ABOUT NATIONWIDE IDENTITY SYSTEMS (Steven T. Kent & Lynette I. Millett eds, National Research Council 2002). The success or failure of such a system is not just dependent on the individual components, but on how well they each work in tandem. Voting is a large complex security challenge that requires an end-to-end concern for security from the voter registration process through the vote casting and tabulation phase. *Hearing on the Relative Merits of Openness in Voting Systems Before the Elections Comm. of the Calif. S.* (Feb. 8, 2006) (testimony of Peter G. Neumann, Principal Scientist, Computer Science

Lab, SRI International).[4] Although the proposal is for a statewide system of identification limited to those who have registered to vote, the implementation for this system would have to follow the same process as any successful identification system.

A. Dissenting Opinion In The Seventh Circuit Court Of Appeals Decision Correctly Notes Many Circumstances (Recent Marriage, Misspellings) Where Eligible Voters May Be Improperly Denied Right To Vote

The errors that will be found in Indiana's proposed voter identification system could occur at any point in the process of collecting, storing and sharing data. Ass'n for Computing Mach., Pub. Policy Comm., *Statewide Databases of Registered Voters: Study of Accuracy, Privacy, Usability, Security, and Reliability Issues* (2006).[5] It is important that if the state of Indiana continues to rely upon voter registration records, that it develops data quality control protocols to improve the accuracy and reliability of this information.

Voters in the state of Indiana faced the prospects of being denied the right to vote because they were unsure if their voter registration efforts had been successful. Election Incident Reporting System, Indiana, Voter Registration (2004).[6] A

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[4] *Available at* http://www.csl.sri.com/neumann/calsen06.pdf.

[5] *Available at* http://www.acm.org/usacm/PDF/VRD_report.pdf.

[6] *Available at* http://www.voteprotect.org/index.php?display=EIRMapState

2004 report found that voters expressed confusion regarding the rules that govern voter registration in several key areas: changes of address within or among counties and/or states, registration deadlines prior to elections, rules that bar registration, *i.e.* felony convictions or college student enrollment, requirements for possession of voter registration document, removal from registration rolls between primary and general elections in 2004, and routine voter participation requirements for continued registration. *Id.*

There may be other reasons for multiple registrations, which include poor record keeping on the part of the state or local governments, as was the case in Marion County, Indiana. Editorial, *Too Close to Election to Purge Voter Roles*, INDIANAPOLIS STAR, Aug. 27, 2004.

B. Discretion Is Still Left With Poll Workers To Make Determinations As To Match Between Identity Card And Registration Record

The Indiana statute would require all citizens presenting themselves at the poll—the vast majority of whom presumably arouse no suspicion—to disclose not only their names but also all information that appears on their identification cards. Further, the Indiana statute would require citizens to present the cards not to police but to poll workers, most of whom are neither professionally licensed in law enforcement nor permanent governmental employees. Todd Rokita, Ind. Sec'y of

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&tab=ED01&state=Indiana&cat=06&start_date=&start_time=00%3A00&end_date=&end_time=00%3A00&search=, 2004.

State, Poll Worker Training Materials ("Indiana Poll Worker Materials").[7] The state of Indiana and local election offices are experiencing great difficulty in recruiting and retaining poll workers. Todd Rokita, Ind. Sec'y of State, Poll Worker Shortages: Could Students Be the Answer?[8] The process for poll worker training has become much more important because of the need to get the process right the first time. State of Ind., *Want to Be a Poll Worker?*[9] In that training, available on the Secretary of State's Web site, examples of acceptable and unacceptable forms of identification are given. Notably, the only two people identifiable as ethnic minorities appear on "unacceptable" photo identification. Todd Rokita, Ind. Sec'y of State, 2007 Photo ID Card Examples ("Indiana ID Examples").[10] It would have been preferable if the types of identification presented included no photographs of people. *Id.* The way that gender, age, race, and ethnicity are emphasized by photo identification, along with the state's desire to collect religious affiliation from some of those who would abstain from providing a photo ID leaves open the specter of "arbitrary and capricious" enforcement. *Chevron U.S.A., Inc. v. Natural Res.*

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[7] *Available at* http://www.in.gov/sos/elections/hava/pollworkertraining.html.

[8] *Available at* http://www.in.gov/sos/elections/hava/pdf/HSHD_LTE.pdf.

[9] *Available at* http://www.in.gov/sos/elections/hava/pdf/PollWorkerBrochure.pdf.

[10] *Available at* http://www.in.gov/sos/elections/hava/pdf/2007%20Photo%20ID%20Card%20Examples.pdf.

Def. Council, Inc., 467 U.S. 837, 845 (1984) The importance of the documents presented is the textual information provided and where to locate that relevant information on the face of the document. While the government generally has no right to interfere with the prejudices and discriminatory practices of individuals, it has not only the right but also the duty to make sure that these practices aren't given the imprimatur of the state. Anita L. Allen, PRIVACY LAW AND SOCIETY (Thomson West 2007).

The state of Indiana's attempt to educate poll workers on the forms of vote identification that are acceptable and unacceptable may have also indicated a flaw in its own rationale about which voters are threats to the democratic process. Indiana ID Examples. Poll workers provide the human judgment used in a gatekeeper function to determine who may vote in public elections. Those voters, whom poll workers do not know personally, often find the hurdles to voting are much higher. Spencer Overton, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 161-62 (W.W. Norton 2006). The subjective nature of the polling operation coupled with the voluntary nature of poll work raises the likelihood of errors by well-meaning people who are not equipped or trained to perform the functions outlined by the new law. Indiana Poll Worker Materials.

C. Absentee Voters Are Eligible To Vote Without Presenting Voter ID And There Is No Way To Assure That Eligible Voters Cast Absentee Votes;

Perfecting Voter Identification Means Eliminating Absentee Voting

The biggest opportunity for rampant voter fraud is absentee ballots.[11] In 2003, a town judge primary election was overturned when a Lake Superior Court judge found that the election outcome was tainted by fraudulent absentee votes. Michael Puente, *Charges in S'ville Judge Race Expected*, POST-TRIBUNE (Merrilville, Ind.), Nov. 18, 2003.

While the state of Indiana has raised the barrier to in-person voter participation through the new photo ID requirement, it has left the gate wide open on actual voter fraud threats posed by absentee voting.[12]

There are also concerns about people without the capacity to cast an independent, and informed vote i.e. those in assisted living or nursing homes, those who suffer from Alzheimer's disease who may have absentee ballots cast in their names. Todd Rokita, Ind. Sec'y of State, Absentee Ballot Long

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[11] Maria A. Morales, Karen Branch & David Lyons, *Carollo Headed Back to Court, Commissioners Don't Act to Fill Mayor's Seat*, MIAMI HERALD, Mar. 6, 1998, at 1A (documenting the confusion caused when a judge calls a new election due to massive absentee voter fraud).

[12] Todd Rokita, Ind. Sec'y of State, Absentee Balloting, Absentee Balloting, http://www.in.gov/sos/elections/hava/absentee.html; Todd Rokita, Ind. Sec'y of State, Importance of Absentee Voting, http://www.in.gov/sos/press/old/101703_oped.pdf; Todd Rokita, Ind. Sec'y of State, Qualifications for Absentee Voting, http://www.in.gov/sos/press/old/101603.pdf; Todd Rokita, Ind. Sec'y of State, Military & Overseas Voter Guide, http://www.in.gov/sos/elections/pdfs/overseas.pdf.

Term Care Facilities Common Questions & Answers.[13]

Whatever solutions may exist to the problem of fraud in absentee balloting, it is clear that the state of Indiana has not addressed this actual problem, instead choosing to burden voters who chose to cast their votes at a public polling place.[14]

II. Indiana Voter ID Scheme Will Be Based On The Flawed REAL ID System

The Indiana voter ID law now before this Court anticipates the implementation of a controversial federal identification law, known as "REAL ID." Because the residents of Indiana will likely be required to obtain a REAL ID to participate in elections in the state of Indiana and because that particular identification scheme has been subject to substantial scrutiny by technical experts and legal scholars, *amici* EPIC explain in this section the problems with the REAL ID system as the basis for voter identification under the Indiana state law.

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[13] *Available at* http://www.in.gov/sos/pdfs/Nursing_Home_FAQ.pdf.

[14] There are ongoing efforts by technologists to develop better models for conducting more private, secure, and reliable balloting methods for public elections. One method that has many of the features necessary for a public election is Punchscan. David Chaum, Punchscan, Voting Method, http://punchscan.org/. *See also*, Ronald L. Rivest, Warren D. Smith, *Three Voting Protocols: ThreeBallot, VAV, and Twin* (2007), *available at* http://people.csail.mit.edu/rivest/RivestSmith-ThreeVotingProtocolsThreeBallotVAVAndTwin.pdf.

A. Indiana Voter ID Law Anticipates Use Of REAL ID To Establish Voter Eligibility

Under Indiana statutes, with few exceptions, registered voters must present a current federal or state government-issued photo ID document in order to vote in person, IND. CODE § 3-5-5-40.5. The parties have agreed such a document would likely be either an Indiana driver's license or identification card. (Decision of the district court below was reported at 458 F.Supp.2d 775, 789 (S.D. Ind. 2006).) Indiana already has begun to implement the REAL ID system in its Bureau of Motor Vehicles ("BMV"), and the state anticipates the use of REAL ID to establish voter eligibility and identification.

Even though final regulations for REAL ID have yet to be released from the U.S. Department of Homeland Security ("DHS"), Indiana began implementing changes in July. State legislation effective July 1, 2007 makes changes to state driver's license and ID card requirements to "help[] prepare the state for compliance with the federal Real ID Act." Press Release, Ind. Bureau of Motor Vehicles, New requirements await BMV customers (July 2, 2007).[15]

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[15] *Available at* http://www.in.gov/newsroom.htm?detailContent=93_9514.htm.

B. Real ID System Is A Flawed System That Will Prevent Voting By Eligible Individuals

The REAL ID Act of 2005 and the draft regulations promulgated by DHS create a fundamentally flawed national identification system that will not improve the security of Indiana's voter identification system. Integrating Indiana's voter system with REAL ID will make it easier to commit identification theft while preventing eligible individuals from exercising their right to vote.

1. REAL ID Is A Multi-Purpose Identity Document; Denial Of Eligibility For One Purpose (Driving) Could Lead To Denial For Unrelated Purposes (Voting)

In order for a voting system of identification to have any chance of working—the process of authentication must rely on the same data set as the registration information. The State's task is to perfectly identify each qualified voter who will be allowed, if they so choose, to vote in a federal election to do so, while at the same time barring participation by those who are not approved to register and vote. In the case of Indiana's voter identification system the registration data and the authentication data are from two different systems of records.

One system of records whose information was collected and retained for one purpose cannot be successfully used by a completely different system for authentication purposes because it would fail

that test. The state's motor vehicle records, US passport, military IDs, or state-issued university identification documents will not match one another or the voting records for many reasons: people do not input the same information for identification documents, middle initials and names may be omitted, address information may be incomplete, clothes and hair styles in an ID picture may change. Assuming uniformity with out adequate grounds for the assumption will lead to errors in the system of identification.

As currently proposed, the federally mandated REAL ID document, based on the state drivers license, will be used for a variety of purposes, including access to federal office buildings or travel on commercial aircraft. Dep't of Homeland Sec., *Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 72 Fed. Reg. 10,819, 10,846 (Mar. 9, 2007) ("REAL ID Draft Regulations").[16]

2. Verification Process Is Not Transparent And Document Is Difficult To Obtain

Under the federal REAL ID Act, states are required to obtain and verify documents from applicants that establish: (1) applicant's identity, through a photo identity document, or a non-photo identity document that includes full legal name and date of birth if a photo identity document is not available; (2) date of birth; (3) proof of SSN or

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[16] *Available at* http://edocket.access.gpo.gov/2007/07-1009.htm.

ineligibility for an SSN; (4) applicant's address of principal residence; and (5) lawful status in the United States. Making Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 202, 119 Stat 231, 312-15 (codified in relevant part in 49 USCS §30301 note (2005) ("REAL ID Act"). Under the draft regulations, the only documents that could be accepted by the states to issue these new identity cards would be: (1) valid unexpired U.S. passport or the proposed passport card under the Western Hemisphere Travel Initiative; (2) certified copy of a birth certificate; (3) consular report of birth abroad; unexpired permanent resident card; unexpired employment authorization document; (4) unexpired foreign passport with valid U.S. visa affixed; (5) U.S. certificate of citizenship; U.S. certificate of naturalization; or (6) REAL ID driver's license or identification card (issued in compliance with the final regulations). REAL ID Draft Regulations at 10,827-28.

There are questions as to whether some citizens could produce these documents, among them Native Americans, victims of natural disasters, domestic violence victims, the homeless, military personnel, or elderly individuals. *See* EPIC and 24 Experts in Privacy and Technology, *Comments on DHS 2006-0030: Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes* (May 8, 2007) ("EPIC Expert

Comments on REAL ID").[17] The difficult standards for acceptable identification documents would limit the ability of some individuals to get a REAL ID card, thereby limiting an Indiana resident's ability to vote.

DHS attempted to resolve this problem by allowing the States to voluntarily create an exceptions process for extraordinary circumstances. REAL ID Draft Regulations at 10,852. However, though DHS set minimum standards for data collection, retention and documentation of the transaction, the agency did not set minimum standards for eligibility, length of process, or cost of process for the extraordinary-circumstances exception. EPIC Expert Comments on REAL ID at 13-14; REAL ID Draft Regulations at 10,834. DHS states that persons born before 1935 might not have been issued birth certificates, so they might be eligible for the exceptions process. REAL ID Draft Regulations at 10,822. Otherwise, there is nothing that explains how individuals could prove eligibility, how long the process would take (days, weeks, months or even years), or if they could even afford the cost of the exceptions process.

Another difficulty with the data verification procedures mandated by the draft regulations is that DHS requires states to verify applicant documents and data with the issuing agency, yet relies on non-existing, unavailable or incomplete databases. EPIC Expert Comments on REAL ID at 14; REAL ID Draft Regulations at 10,833.

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[17] *Available at* http://www.epic.org/privacy/id_cards/epic_realid_comments.pdf.

3. There Is An Increased Risk Of Identity Theft With Centralized Identity Management System

The REAL ID draft regulations require a national identification system with a 56-state-and-territory database, which creates enormous security risks. EPIC and others have explained that it decreases security to have a centralized system of identification, one ID card for many purposes, as there will be a substantial amount of harm when the card is compromised.[18]

The REAL ID Act mandates that U.S. states and territories provide each other with electronic access to information contained in their motor vehicle databases and each state database must contain all data fields printed on driver's licenses and ID cards, and driver's histories, including motor vehicle violations, suspensions, and points on licenses. REAL ID Act at §§ 202(d)(12), (d)(13). This huge national database would contain the personal information of 245 million license and ID cardholders—a database that could be accessed at thousands of DMVs across the country.

DHS and some states are seeking to expand the use of the REAL ID system. In the draft regulations, DHS seeks comments on "how DHS could expand [the card's official purposes] to other federal activities." REAL ID Draft Regulations at 10,823. Homeland Security Secretary Michael

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[18] *See Hearing on "Maryland Senate Joint Resolution 5" Before the Judicial Proceedings Comm. of the Md. S.* (Feb. 15, 2007) (statement of Melissa Ngo, Dir., EPIC Identification & Surveillance Project), *available at* http://www.epic.org/privacy/id_cards/ngo_test_021507.pdf.

Chertoff said he envisioned the REAL ID licenses "do[ing] double-duty or triple-duty." Michael Chertoff, Sec'y, Dep't of Homeland Sec., Remarks at the National Emergency Management Association Mid-Year Conference (Feb. 12, 2007).[19] These national identification cards would "be used for a whole host of other purposes where you now have to carry different identification." *Id.*

Arizona, Washington and Vermont are piloting programs to use licenses as border identity documents by adding citizenship designations and wireless radio frequency identification ("RFID") technology chips to the cards.[20] Add to these myriad uses the fact that Indiana seeks to use the national ID card as voter identification.

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[19] *Available at* http://www.dhs.gov/xnews/speeches/sp_1171376113152.shtm.

[20] Hearing on Confronting the Terrorist Threat to the Homeland: Six Years After 9/11 Before the S. Comm. on Homeland Sec. & Governmental Affairs, 110th Cong. (Sept. 10, 2007) (testimony of Michael Chertoff, Sec'y, Dep't of Homeland Sec.), *available at* http://www.dhs.gov/xnews/testimony/testimony_1189515509899.shtm; Press Release, Dep't of Homeland Sec., Department of Homeland Security and the State of Washington Team Up to Advance Western Hemisphere Travel Initiative (Mar. 23, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1174904636223.shtm; Press Release, Dep't of Homeland Sec., Department of Homeland Security and the State of Vermont Team Up to Advance Western Hemisphere Travel Initiative (Aug. 20, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1187646614580.shtm; Press Release, Dep't of Homeland Sec., Department of Homeland Security and the State of Arizona Team Up to Advance Secure ID Initiatives (Aug. 21, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1187969723463.shtm.

A centralized identity management system is bad security. Using a national identification card such as REAL ID would be as if you used one key to open your house, your car, your safe deposit box, your office, and more.[21]

Security expert Bruce Schneier has analyzed the REAL ID system and detailed various problems, such as the fact that though "[w]e can raise the price of forgery, but we can't make it impossible," so evildoers will get fake REAL ID cards. Bruce Schneier, *Real-ID: Costs & Benefits,* BULLETIN OF ATOMIC SCIENTISTS, Mar./Apr. 2007.[22] With REAL ID, the damage that can be done by using a fraudulent national ID card would be significantly higher than with today's state ID cards. A national identification system would divide the United States into two groups: (1) "trusted good guys" who have the national ID card, and (2) "untrusted bad guys" who do not. But, Schneier has pointed out that there is a third category that appears – bad guys who fit the good guy profile who could abuse the system and carry legitimately issued REAL ID cards. *Id.*

Large data breaches affect the confidence and trust of the public. People will recoil from systems that create privacy and security risks for their personal data. We have seen countless security

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[21] *See Meeting on "REAL ID Rulemaking" Before the Data Privacy & Integrity Advisory Comm.*, Dep't of Homeland Sec. (Mar. 21, 2007) (statement of Melissa Ngo, Dir., EPIC Identification & Surveillance Project), *available at* http://www.epic.org/privacy/id_cards/ngo_test_032107.pdf.

[22] *Available at* http://www.schneier.com/blog/archives/2007/01/realid_costs_an.html.

breaches that have left the personal data of tens of millions of Americans vulnerable to misuse. *See* EPIC Expert Comments on REAL ID at 43-46. Recently, almost 46 million credit and debit card numbers were stolen by hackers who accessed the computer systems at TJX Companies over a period of several years, making it the biggest breach of personal data ever reported. TJX Cos., Annual Report (Form 10-K), at 8-10 (Mar. 28, 2007).[23] The security breaches began in July 2005 but weren't discovered until December 2006—the financial data of millions were exposed for 17 months. *Id.* at 7.

A year ago, an information security breach by a Department of Veterans Affairs employee resulted in the theft from his Maryland home of unencrypted data affecting 26.5 million veterans, active-duty personnel, and their family members.[24] A laptop and an external hard drive contained unencrypted data that included millions of Social Security numbers, disability ratings and other personal information. Statement, Dep't of Veterans Affairs, A Statement from the Department of Veterans Affairs (May 22, 2006).[25]

There is another significant security risk, besides that of attacks by unauthorized users, and that is of authorized users abusing their power. *See* EPIC Expert Comments on REAL ID at 45-46. A

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[23] *Available at* http://ir.10kwizard.com/download.php?format=PDF&ipage=4772887&source=487.

[24] For complete details, *see* EPIC, Page on the Veterans Affairs Data Theft, http://www.epic.org/privacy/vatheft/.

[25] *Available at* http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1123.

recent government scandal highlights the dangers associated with massive identification systems. In September, a former Department of Commerce agent was indicted and charged with using the Treasury Enforcement Communications System ("TECS") to stalk a former girlfriend and her family. Press Release, Dep't of Justice, Former Department of Commerce Agent Indicted For Making a False Statement and Exceeding Authorized Access To a Government Database (Sept. 19, 2007).[26] While employed at the Commerce Department, the agent is alleged to have accessed the system at least 163 times during a 10-month period. *Id.* TECS contains "every possible type of information from a variety of Federal, state and local sources," including the FBI's National Criminal Information Center and state motor vehicle records. Dep't of the Treasury, *Notice of Privacy Act System of Records*, 66 Fed. Reg. 52983, 53029 (Oct. 18, 2001).[27]

A 2005 scandal in Florida also highlights risks associated with large database systems, such as the one Indiana seeks to use for voter identification. A woman wrote to a newspaper criticizing a Florida sheriff as being too fat for police work and condemning his agency's use of stun guns. Anthony Colarossi, *FDLE Reviewing Beary's Actions Agency To Determine If Sheriff Misused Database To Write*

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[26] *Available at* http://www.usdoj.gov/usao/can/press/2007/2007_09_19_robinson.indicted.press.html.

[27] *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=f:18ocn2.pdf.

Critic, ORLANDO SENTINEL, Apr. 9, 2005, at B01. Orange County Sheriff Kevin Beary ordered staffers to use state driver's license records to find the home address of his critic. The sheriff sent her a letter at her home address instead of responding publicly by sending a rebuttal letter to the editor. *Id.* In a case in Maryland just last year, three people—including a Maryland Motor Vehicle Administration official—were indicted on charges of "conspiring to sell unlawfully produced MVA-issued Maryland identification cards." *Fake ID Cards*, WASH. POST, Mar. 15, 2006, at B02. Such insider misuse and abuse would make it easy to circumvent the security sought by the supporters of the Indiana voter photo ID requirement.

The consumer harm that results from wrongful disclosure of personal data is clear. For the seventh year in a row, identity theft is the No. 1 concern of U.S. consumers, according to the Federal Trade Commission. Fed. Trade Comm'n, *Consumer Fraud and Identity Theft Compliant Data: January—December 2006* (Feb. 7, 2007).[28] Reports show that over 216 million records of U.S. residents have been exposed by security breaches since January 2005. Privacy Rights Clearinghouse, Chronology of Data Breaches.[29]

A centralized system of identification creates a "one-stop shop" for identity thieves. Centralizing authority over personal identity into one database and one card increases both the risk of identity theft as well as the scope of harm when it occurs.

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[28] *Available at* http://www.consumer.gov/sentinel/pubs/Top10Fraud2006.pdf.

[29] http://www.privacyrights.org/ar/ChronDataBreaches.htm.

Indiana's plan to use the REAL ID system for voter photo identification is fundamentally flawed.

4. Current State-Based, Decentralized Voter ID System Is More Robust And Catastrophic Failure Is Less Likely

With the REAL ID national identification system, DHS imposes new requirements on State motor vehicle agencies. Each of the 56 interconnected databases must contain all data fields printed on driver's licenses and ID cards, and driver's histories, including motor vehicle violations, suspensions, and points on licenses. REAL ID Act §§ 202(d)(12); (d)(13). The states are compelled to begin maintaining paper copies or digital images of important identity documents, such as birth certificates or naturalized citizenship papers, for seven to 10 years. REAL ID Draft Regulations at 10,855. This is a significant expansion of the personal data previously reviewed or stored by State motor vehicle agencies.

Currently these documents are kept in a variety of places—the Social Security system, the immigration system, local courthouses—and it takes considerable effort to gather them all together. Under REAL ID, all of these identification documents—concerning, among other things, births, marriages, deaths, immigration, social services—are consolidated into one national database, accessible to at least tens of thousands of government employees nationwide, which would give the federal and state governments greater access than before.

The current state-based, decentralized voter identification system is more robust and catastrophic failure is less likely than with the REAL ID system Indiana plans to use. A system of distributed identification reduces the risks associated with security breaches and the misuse of personal information. For example, a banking PIN number, in conjunction with a bankcard, provides a better authentication system because it is not coupled with a single, immutable consumer identity. If a bankcard and PIN combination is compromised, a new bankcard and PIN number can be issued and the old combination cancelled, limiting the damage done by the compromised data. Drawbacks of such structures, including the possibility for the existence of multiple cards, are currently being addressed by the creation of an identity metasystem in which multiple identities can be loosely coupled within a single secure system. Kim Cameron, *The Laws of Identity*, Identity Weblog, Dec. 9, 2004.[30]

Distributing identity in this way allows for different profiles to be used in different authenticating contexts. New profiles can be created as required within a single identity metasystem. Misuse is therefore limited to the context of the information breached, whether it is a single bank account, online merchant, or medical records. The current decentralized voter ID system is more secure than Indiana's proposed system.

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[30] http://www.identityblog.com/stories/2004/12/09/thelaws-.html.

5. Many States Have Rejected The REAL ID System

Though Indiana seeks to integrate its voter identification system into REAL ID, the state is an outlier. Seventeen states have passed laws going against a new federal ID requirement, and legislation opposing the system has been introduced in 21 other states.[31] Some state lawmakers have gone as far to call this federal effort an attempt to create a "papers-please society." Thomas Frank, *6 States defy law requiring ID cards*, USA TODAY, June 18, 2007.

DHS has continually insisted that the REAL ID is not a national identification system, because states can "choose" not to implement the REAL ID system. However, states are under considerable pressure to implement REAL ID and citizens who fail to carry the new identity document will find it impossible to pursue many routine activities.

DHS Secretary Michael Chertoff has said that although REAL ID s not a mandate, states would be punished for non-compliance. He said that citizens in states that do not implement REAL ID would not be able to use their state-issued ID cards for federal purposes, such as entering courthouses or flying domestically. *Id.* Press Release, Dep't of Homeland Sec., Remarks by Homeland Security Secretary Michael Chertoff and New York Governor Eliot Spitzer on Secure Ids (Oct. 27,

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[31] For more on anti-REAL ID legislation in the states, *see generally*, EPIC, National ID Cards and REAL ID Act, http://www.epic.org/privacy/id_cards/.

2007).[32] This means that citizens in these states would use passports, which currently cost $97 each, and the State Department admitted in June that there is a significant backlog in processing passports because of, among other things, "miscalculation" in preparing for implementation of the Western Hemisphere Travel Initiative ("WHTI"). *Hearing on the Passport Backlog and the State Department's Response to the Western Hemisphere Travel Initiative Before the S. Comm. on Foreign Relations*, 110th Cong. (June 19, 2007) (testimony of Maura Harty, Ass't Sec'y for Consular Affairs, Dep't of State). The "miscalculation" was so severe that the Department of Homeland Security had to delay implementation of WHTI from January 2007 until September 2007. *Id.*

The poor planning and miscalculations for WHTI implementation could be a harbinger of REAL ID implementation. Even DHS has had to admit that there are massive problems with the REAL ID system. The final regulations, originally to be released in September, have yet to be published. The original deadline for REAL ID implementation was May 2008. In March, however, DHS pushed the deadline to 2013. REAL ID Draft Regulations at 10,822. Now DHS is considering delaying implementation until 2018, a decade beyond the original deadline. Spencer S. Hsu, *Homeland Security Retreats From Facets of 'Real ID,'* WASH. POST, Nov. 4, 2007, at A07. A DHS official reportedly said REAL ID's cost should be cut by "billions of dollars" as DHS eases previous

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[32] *Available at* http://www.dhs.gov/xnews/releases/pr_1193719147502.shtm.

requirements that REAL ID-compliant licenses "be renewed every five years, that expensive, tamper-resistant materials be used to create the ID cards, and that each state develop its own document verification systems." *Id.*

Critics of REAL ID have been labeled anti-security. In Congressional testimony, a high-ranking DHS official said, "Any State or territory that does not comply increases the risk for the rest of the Nation." *Hearing on Understanding the Realities of REAL ID: A Review of Efforts to Secure Drivers' Licenses and Identification Cards Before the Subcomm. on Oversight of Gov't Management, the Federal Workforce & the District of Columbia, S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. (Mar. 26, 2007) (testimony of Richard C. Barth, Ass't Sec'y for Policy Dev., Dep't of Homeland Sec.).[33] It is not anti-security to reject a national identification system that does not add to our security protections, but in fact makes us weaker as a nation. Indiana's choice to integrate its voter identification system with this fundamentally flawed national identification system would harm its interest in increasing voter identification security.

CONCLUSION

Not only has the state failed to establish the need for the voter identification law or to address the disparate impact of the law, the state's voter ID system is imperfect, and relies on a flawed federal identification system.

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[33] *Available at* http://hsgac.senate.gov/_files/Testimonybarth.pdf.

Amici EPIC respectfully requests this Court to grant Petitioner's motion to reverse the decision of the lower court.

Dated: November 13, 2007

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 07-21, 07-25

In The
Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,

v.

TODD ROKITA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE,* UNITED STATES CONGRESSMAN KEITH ELLISON, IN SUPPORT OF PETITIONERS

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November 12, 2007

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INTEREST OF THE *AMICUS CURIAE*[*]

Amicus Curiae, Keith Ellison, a Member of Congress representing Minnesota's Fifth District, and a member of the House Judiciary Committee, submits this brief on behalf of himself and other concerned Members of Congress in support of Petitioners' challenge to Indiana's statute requiring voters to present government-issued photographic identification (hereinafter "photo ID") as a prerequisite to voting.[1] *Amicus* is committed to ensuring that all Americans have an equal opportunity to exercise their right to vote. *Amicus* is concerned that the Indiana requirement violates the Twenty-Fourth Amendment to the United States Constitution because it imposes a financial obligation as a prerequisite to voting.

Congressman Ellison is deeply committed to equal rights for all citizens. He has worked extensively on the issues of voting and civil rights. During his time in the Minnesota State Legislature, Congressman

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[*] *Amicus* would like to acknowledge the work of Lara J. Cole, Legislative Assistant, and Ericke S. Cage, Congressional Black Caucus Foundation Congressional Fellow. Under the supervision of *Amicus*, these two lawyers co-authored this brief. *Amicus* would also like to thank Venable LLP for its legal expertise and services.

[1] *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record of all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

Ellison frequently introduced legislation protecting voting rights. He authored legislation restoring voting rights to persons with felony convictions and initiatives to require local units of government to notify ex-offenders that their civil and voting rights had been restored.

In his first term in Congress, Congressman Ellison has taken a strong interest in civil and voting rights. The Congressman currently serves on the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Additionally, he has authored two major bills on voting rights, the *Same Day Voter Registration Act of 2007*, H.R. 2457, 110th Cong. (2007), and the *Voter Access Protection Act of 2007*, H.R. 4026, 110th Cong. (2007). H.R. 2457 would require states to permit individuals to register to vote in a federal election on the day of the election. H.R. 4026 would prohibit election officials from requiring an individual to provide photo ID as a condition for voting in a federal election.

CONSENT OF THE PARTIES

With the consent of all the parties, Congressman Keith Ellison respectfully submits this brief as *amicus curiae* in support of Petitioners, and urges the reversal of the appellate court's judgment.

SUMMARY OF THE ARGUMENT

The Twenty-Fourth Amendment to the United States Constitution prohibits a state from abridging a citizen's right to vote by prohibiting "any poll tax or

other tax."[2] Indiana's photo ID requirement violates the Twenty-Fourth Amendment.[3] The requirement is unconstitutional not only because voters must initially spend money to obtain the requisite government-issued photo ID or obtain related documentation, but also because voters who wish to qualify as "indigent" under the statute must make a separate trip to a county office and "affirm" their economic status before being allowed to vote. This is an unconstitutional burden on the fundamental right to vote. This Court has made clear that "[a] state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of a fee an electoral standard." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966). In *Harman v. Forssenius*, 380 U.S. 528, 541 (1965), this Court further explained that even "providing a procedural alternative to a poll tax unquestionably erects a real obstacle to voting in federal elections." The Indiana statute requires all voters to pay the requisite fee to obtain photo ID and/or to pay fees to obtain underlying documentation necessary to get IDs. If voters do not have ID because they cannot afford these fees, they must vote a provisional ballot at the polls, and then make a separate trip to a county office to affirm that they are indigent. It is unquestionable that this scheme creates

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[2] U.S. Const. amend. XXIV.

[3] Effective July 1, 2005, Indiana law was changed to require voters to present a photo ID, issued by the United States or Indiana, that is not expired or expired after the date of the most recent general election. Ind. Code § 3-5-2-40.5.

a real obstacle to voting in a federal election, and thus it is unconstitutional.

Like literacy tests, poll taxes are a particularly egregious form of discrimination because they make income a voting requirement. While the Indiana photo ID requirement does not precisely mimic the poll taxes of the 1960's, it has the same effect and intent. The label a state chooses to place on fees it charges its citizens cannot change the fundamentally unconstitutional character of those fees.

Voter equality is the singular thread which runs through Congress' voting rights legislation. Over the past 137 years, Congress, with the support of the Civil Rights movement, has worked steadfastly to secure equal voting rights for all citizens. Through the proposal of the Twenty-Fourth Amendment to the Constitution, and the enactment of the Voting Rights Act of 1965 and the Help America Vote Act of 2002, Congress has rejected any requirement that conditions the franchise on a voter's economic status. Poll taxes have been used throughout American history as tools of disenfranchisement.

The Indiana photo ID requirement would also have a disparate impact on African-Americans, a class of citizens specifically protected by Congressional legislation. African-American residents are less likely to own a motor vehicle and thus are less likely to have a driver's license. As a practical matter, this statute would have the effect of disenfranchising a greater number of African-American citizens, because, for many, such a requirement presents a financial burden and hardship.

ARGUMENT

I. THE INDIANA PHOTO ID REQUIREMENT IS AN UNCONSTITUTIONAL POLL TAX AND OFFENDS DECISIONS OF THIS COURT AND THE TWENTY-FOURTH AMENDMENT

The Indiana statute is unconstitutional because it conditions voting rights on payment of a "tax"—either the fee of twenty-one dollars that the state ordinarily charges for a driver's license, or where citizens qualify for a free identification card, the fees they must pay to acquire underlying documentation necessary to get a photo identification card. Ind. Code §§ 3-5-2-40.5, 9-24-16-10(b).[4] The practice of using poll taxes to prevent access to the franchise was banned in federal elections in 1964 by the Twenty-Fourth Amendment to the United States Constitution, passed by Congress in 1962 and ratified by the states in 1964.[5] The Twenty-Fourth Amendment states, "The right of citizens of the United States to vote in any primary or other election for President or Vice President...shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax."[6]

In *Harman v. Forssenius*, 380 U.S. 528 (1965), this Court concluded that no state may constitutionally present a federal voter with the requirement that

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[4] *See* http://www.dmv.org (last visited Nov. 12, 2007).

[5] U.S. Const. amend. XXIV.

[6] *Id.*

either he pay a poll tax, or file a certificate of residence. This requirement was an abridgement of the right to vote and thus unconstitutional under the Twenty-Fourth Amendment. *Id.* at 538. This Court recognized the long Congressional history opposing the constitutionality of the poll tax. *Id.* at 538-39. In other words, creating a procedural workaround voters must go through to avoid a poll tax does not redeem the poll tax's fundamental unconstitutionality. This Court further recognized the long and rich history in this country that "a state may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Id.* at 540.

In this case, Petitioners seek to protect their constitutional right to vote without being charged a tax. In order to demonstrate that the Indiana statute is invalid, Petitioners need only show that the law "imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Harman*, 380 U.S. at 541. This Court opined that in *Harman*, the $1.50 poll tax and the alternative of filing a certificate of residence "unquestionably erects a real obstacle" to voting in federal elections. *Harman*, 380 U.S. at 541. The Indiana statute imposes similarly burdensome requirements on a voter and as a result also "unquestionably erects a real obstacle" to voting in a federal election and is therefore unconstitutional. *Id.* at 541.

Since then, this Court has separately identified the Fourteenth Amendment's Equal Protection Clause as a source of protection against the conditioning of the franchise on payment of a fee, even in state elections.

See Harper, 383 U.S. 663 (1966). In *Harper*, this Court concluded that a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of a fee an electoral standard. *Harper*, 383 U.S. at 666. Introducing wealth or payment of a fee as a measure of a voter's qualification is, under the Court's *Harper* analysis, a "capricious or irrelevant" factor. *Id.* at 668. When fundamental rights and liberties are at stake, any classifications such as wealth or class that might abridge those rights must be closely scrutinized and carefully confined. *Id.* at 670. The fundamental right to vote should not be conditioned on a citizen's economic status.

While the Indiana law at issue does not label the fees charged as "taxes," the labels a state chooses to assign its disenfranchising tactics cannot determine the constitutional analysis, or else no protection at all is afforded by the Twenty-Fourth Amendment. *Cf.* H.R. Rep. No. 89-439, at 10 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443 (noting in enacting Voting Rights Act, "Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.").

Effective July 1, 2005, Indiana required voters to present a photo ID, issued by the United States or Indiana, that is not expired or expired after the date of the most recent general election. Ind. Code § 3-5-2-40.5. If the voter does not present this identification, he or she is entitled only to vote provisionally. Ind. Code § 3-167-5-25. A provisional ballot requires a voter to return to the Clerk of the circuit court or the County

Election Board within ten days after the election and either produce a satisfactory ID or execute an affidavit stating that either he is indigent and unable to obtain proof of identification without having to pay a fee, or that he has a religious objection to being photographed. The state provides the opportunity to obtain a photo ID card without fee, but would-be voters must show supporting documentation to get the photo ID that typically cannot be obtained for free. For example, most United States-born voters will need to produce a birth certificate along with another form of documentation to get a photo ID. *See* Pet. App. 32-33. A certified birth certificate costs $10 and a voter born out of state may have to pay as much as $45. Brief for *Amicus Curiae*, Lawyers' Committee for Civil Rights Under Law in support of Appellants at 19, *Crawford* and *Democratic Party of Indiana*, Nos. 07-21 and 07-25 (7th Cir. Nov. 12, 2007).

The statute's exception for the "indigent" is no exception at all; it requires those who cannot obtain identification without a fee to separately travel to a county office within ten days after the election to affirm their indigency, thus imposing a severe additional burden in lieu of the poll tax. In *Harman*, this Court rejected Virginia's requirement that voters either pay a poll tax or execute a certificate of residence prior to the election. *See Harman*, 383 U.S. 663. Similarly, in this case, Indiana requires voters either to pay a poll tax—the cost involved in procuring ID or in procuring the underlying documentation—or to execute an affidavit of indigency on a separate trip to a county office after the election. Like the Virginia law at issue in *Harman*, Indiana's law is unconstitutional. It is also no answer for the state to

suggest that the tax charged in this instance—the twenty-one dollars a driver's license ordinarily costs, or the ten dollars Indiana routinely charges for a birth certificate, is *de minimis*. In *Harper*, this Court found unconstitutional Virginia's conditioning of the right to vote on payment of a $1.50 tax. In 2007 dollars, that tax would be $9.63, less than the price of any of the acceptable photo IDs.[7]

Proponents of photo ID requirements argue that because the majority of Americans already possess some form of photo ID, the requirement is not burdensome or unconstitutional. *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *reprinted in* Petitioners' Appendix to the Petition for Writ of Certiorari, 1-15. They further argue that those who really want to vote will simply obtain the required photo ID. *Id.* This is simply wrong. The right to vote belongs to the individual voter, not to any group of people. The fact that the majority of the population has photo ID does not make this law constitutional. Of course, some people who do not have photo ID may be able to afford its cost or the cost of underlying documents, but the fact that they are *required* to pay for it is exactly what makes this law a poll tax. The Twenty-Fourth Amendment admits of no exception: poll taxes are unconstitutional on their face, and it is immaterial how many people can afford to pay them.

In the Seventh Circuit's opinion below, Judge Posner opined:

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[7] http://www.bls.gov/cpi/ (last visited Nov. 12, 2007).

> [A] vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote...very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in.

Id. at 3.

These opinions are dangerously misguided. The presidential election of 2000 was decided by only hundreds, not thousands of votes out of over one hundred million. *The Election; Surprise! Elections Have Margins of Error, Too*, N.Y. Times, Nov. 19, 2000, Week in Review, § 4, at 3. Every single vote was absolutely crucial. Furthermore, every citizen is guaranteed the right to have his or her vote counted, regardless of the view that any vote does not have "instrumental value." *See Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("No right is more precious in a free country than" the right to vote.)

II. CONGRESS HAS CONSIDERED AND REJECTED PHOTO ID REQUIREMENTS SIMILAR TO THOSE IN INDIANA

Congress has long defined a poll tax as a cost or a fee that abridges the right to vote, first through its enactment of the Twenty-Fourth Amendment, and later through its direction to the Attorney General to challenge the use of the poll tax under section 10 of the Voting Rights Act of 1965. Since the Twenty-Fourth Amendment was ratified, Congress has continued to ensure that voters are guaranteed access to the ballot

box. During its consideration of the Help America Vote Act of 2002, ("HAVA"), Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. § 15301 (2002)), Congress considered and rejected photo identification requirements for federal elections. *See generally*, 148 Cong. Rec. S1224, 1227 (daily ed. Feb. 27, 2002) (Statements of Sen. Schumer and Sen. Landrieu); Sara Sanchez, *Voter Photo Identification and Section 5 Reauthorization: An Exposition of Two Carter-Baker Commission Proposals and Their Current Status*, 10 N.Y.U. J. Legis. & Pub. Pol'y. 261, 263 (2006-2007). In the Congressional debate surrounding HAVA, Congress considered other documentary requirements that are generally much less restrictive than Indiana's photo ID provisions. It allowed proof of identity through non-photo identification. This proof was limited to individuals voting for the first time whose identities had not been previously verified by the state, because a general requirement would suppress poor and minority voters. Indeed, the Senate Conference Report on HAVA highlights this concern:

> |A|s with the other methods of disenfranchisement in American history, such as literacy tests and *poll taxes*, the photo identification requirement would present barriers to voting and have a chilling effect on voter participation. There are voters who simply do not have identification and requiring them to purchase photo identification *would be tantamount to requiring them to pay a poll tax*. As a disproportionate number of racial and ethnic minority voters, the homeless, as well as voters with disabilities and certain religious objectors, do not have photo identification nor

> the financial means to acquire it, the burden of this requirement would fall disproportionately and unfairly upon them, perhaps even violating the Voting Rights Act, 42 U.S.C. s1973.

148 Cong. Rec. S10488 (2002) (emphasis added).

Following the passage of HAVA, Congress again considered and rejected several items of legislation that would have broadened federal voter identification requirements. For example, H.R. 2250, 109th Cong. (2005), would have required voters and applicants for voter registration to present government-issued photo identification when appearing in person, or to submit a copy of that identification with mailed applications or ballots. H.R. 3910, 109th Cong. (2005), would have required all voters, beginning with the 2008 election, to present state-issued photo identification when voting and would have established specifications for those identification documents. H.R. 4462, 109th Cong. (2006), and H.R. 5913, 109th Cong. (2005), would have required voters to provide proof of citizenship when voting or to have such proof on file with the state election office. The *Federal Election Integrity Act of 2006*, H.R. 4844, 109th Cong. (2006), would have required states to provide photo identification documents to qualified voters who did not have such documents, and to provide them to indigent voters at no extra cost.[8] While a negative implication from legislative history is not absolute proof of

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[8] H.R. 4844 would have gone so far as to authorize the appropriation of funding to cover the cost of providing identification to indigent voters.

Congressional intent, the failure of these bills to become law reflects Congress' reluctance to embrace stringent photo identification requirements.

Currently under consideration is the *Voter Access Protection Act of 2007*, H.R. 4026, 110th Cong. (2007), a bill which would prohibit election officials from requiring an individual to provide photo ID as a condition for voting in an election for federal office.

III. INDIANA'S PHOTO ID REQUIREMENT WILL HAVE A DISPARATE IMPACT ON AFRICAN-AMERICANS

The existence of poverty in Indiana's African-American community is pervasive. A review of the poverty levels in Indiana's ten largest counties in 2007 reveals that African-Americans disproportionately represent the largest percentage of county residents living in poverty.[9] For example, in Elkhart County, Indiana, African-Americans made up only 5% of the total population, yet represented 21% of the county's poverty rate.[10] In Vanderburgh County, African-Americans made up only 8% of the population yet represented 31.2% of the county's total poverty rate. And in Vigo County, African-Americans made up 6% of the population yet represented 31.9% of the county's total poverty rate. A large percentage of Indiana's African-American voters are included in the more than

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[9] *See Indiana's Income by Race, available at* http://www.incontext.indiana.edu (last visited Nov. 8, 2007).

[10] *Id.*

2.5 million Indiana households that do not own a motor vehicle, and they most likely will not have the requisite photo ID for voting purposes.

A newly-released study concluded that the disproportionate effects of Indiana's photo identification requirements are not "confined to a narrow segment of the Indiana population." Matt A. Barreto *et al.*, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, at 16 (Wash. Inst. for the Study of Ethnicity and Race, Working Paper, Nov. 8, 2007), *available at* http://depts.washington.edu/uwiser/documents/indiana_voter.pdf. Indeed, the study results suggest that "income has the *most robust impact on access to valid forms of identification in Indiana*. [The] law therefore directly impacts roughly one-fifth of Indiana residents, as 21% of Indiana households earned less than $20,000 in the year 2000. Similarly, African-Americans who are also less likely to have access to photo identification in our study *comprise nearly 9% of the state population*." *Id.* (emphasis added). *See* Figure 1, reproduced from Barreto study.

Percent of registered voters without valid Photo ID in Indiana

	(1b) Driver's License	(2b) Current DL or State ID Card	(3b) Valid ID + Full Name	(4b) Valid ID + Name Match
All RVs	16.6	13.3	16.3	17.3
Voted06	14	10.7	13.9	14.1

Percent of registered voters without valid Photo ID in Indiana

	(1b) Driver's License	(2b) Current DL or State ID Card	(3b) Valid ID + Full Name	(4b) Valid ID + Name Match
Non-Voter	22.8	19.3	21.9	24.9
Non-Registered†	35.2	22.2	24.6	n/a
White	14	11.5	15	15.8
Black	33.3	18.1	19.3	21.8
Men	17.5	15.2	18.5	18.7
Women	15.8	11.5	14.3	16.1
18-34	26.6	20.3	20.3	22
35-54	12.6	11	14.8	16.2
55-69	12.3	9.4	13.6	14.1
70+	21.3	16.4	19.4	19.4
HS Grad	21.7	16.7	19.9	21
College grad	8.6	7.9	10.7	11.5
Less $40K	25.2	17.5	19.5	21.1
$40K - $80K	12.9	11.2	12	12.7
Over $80K	11.8	11.8	16.5	17
Marion County	25	18.5	19.6	21.9

It has been reported that the Department of Justice has also recognized the suppressive effects that photo ID on requirements have on African-Americans:

> The Department of Justice (DOJ) has consistently raised objections to imposing photo identification as a prerequisite for voting because such requirements are likely to have a disproportionately adverse impact on black voters and will lessen their political participation opportunities. In 1994, DOJ found that African-American persons in Louisiana were four to five times less likely than white persons to have driver's licenses or other picture identification cards. In addition, the Federal Elections Commission noted in its 1997 report to Congress that photo identification entails major expenses, both initially and in maintenance, and presents an undue and potentially discriminatory burden on citizens in exercising their basic right to vote.

148 Cong. Rec. S10488 (2002).

By requiring the presentation of photo ID as a precondition to voting, Indiana ignored the predictable disparate impact the law would have on Indiana's African-American residents. Although the stated rationale for enacting the law was to combat voter fraud, the record shows that the Indiana Legislature conducted no research or received no testimony to determine the level of voter fraud in the State. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949 (2007), *reprinted in* Petitioners' Appendix to the Petition for Writ of Certiorari, 1-15; Richard L. Hansen, *A Voting Test for the High Court*, Wash. Post, Sept. 19, 2007, at A23; Adam Liptak, *Fear but Few Facts in Debate over Photo ID's*, N.Y. Times, Sept. 24, 2007. Indeed, it has been established that "no

systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state...but the best existing data suggest that a photo identification requirement would do more harm than good." Spencer Overton, *Voter Identification*, 105 Mich L. Rev. 631, 635 (2007). Based on Indiana's poverty numbers alone, the proponents of the Indiana statute knew or should have known that a photographic identification requirement would disproportionately affect African-Americans. Indiana's photographic identification requirement is a poll tax which will disproportionately affect Indiana's African-American community. While the new costs associated with voting in Indiana may not be directly payable at the precinct door, the deterrent effect is the same.

Ratification of the Twenty–Fourth Amendment marked the culmination of an endeavor that Congress began in 1939 to eliminate the poll tax as a qualification for voting in federal elections. Congress viewed the qualification as "an obstacle to the proper exercise of a citizen's franchise" and expected its removal to "provide a more direct approach to participation by more of the people in their government." H.R. Rep. No. 87-1821, at 3, 5 (2d Sess. 1962); *see Harman*, 380 U.S. at 538-40.

Congress remains opposed to any requirements that place an economic burden on the right to vote. The State of Indiana points to the fact that it, like many states, waives the cost of the photo ID required for voting for voters unable to pay the fees. This fails to account for the cost of underlying documentation required to get an identification card. Moreover, the

argument reflects a failure to focus on the key factor surrounding the State's law – the Twenty-Fourth Amendment. Through the passage of the Twenty-Fourth Amendment Congress made clear that any voter requirement that calls into question a voter's economic status presents a "capricious and irrelevant factor" that is impermissible under the Constitution. *See Harper*, 383 U.S. 663 (1966); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). Thus, Indiana's photo identification requirement directly conflicts with the Twenty-Fourth Amendment, not only because it requires voters to spend money to obtain the requisite government-issued photo identification, but also because it requires indigent voters to affirm their economic status before being allowed to vote.

The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1971 *et seq.*, defines the word "vote" as encompassing "all actions necessary to make a vote effective including, but not limited to, registration or other actions required by State law prerequisite to voting, casting a ballot and having such ballot counted and included in the appropriate totals of votes with respect to candidates for public office." 42 U.S.C. § 1971(e). Because African-Americans are among the class of individuals Congress intended to protect under the Voting Rights Act, and since Indiana's photo ID requirement touches upon "an action to make a vote effective," Indiana's photo identification requirement is both discriminatory and contrary to the intent of Congress.

CONCLUSION

For the forgoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Dated: November 12, 2007

Respectfully submitted,

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APPENDIX A

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Rep. Sanford Bishop, Jr.
Rep. Corrine Brown
Rep. G.K. Butterfield
Delegate Donna Christian-Christensen
Rep. Yvette Clarke
Rep. William Lacy Clay
Rep. Emanuel Cleaver, II
Rep. James E. Clyburn
Rep. John Conyers, Jr.
Rep. Elijah E. Cummings
Rep. Artur Davis
Rep. Danny K. Davis
Rep. Chaka Fattah
Rep. Al Green
Rep. Alcee L. Hastings
Rep. Jesse L. Jackson, Jr.
Rep. William J. Jefferson
Rep. Eddie Bernice Johnson
Rep. Henry "Hank" Johnson
Rep. Stephanie Tubbs Jones
Rep. Carolyn Cheeks Kilpatrick

Rep. Barbara Lee
Rep. Sheila Jackson-Lee
Rep. John Lewis
Rep. Kendrick B. Meek
Rep. Gregory W. Meeks
Rep. Gwen Moore
Delegate Eleanor Holmes Norton
Rep. Donald M. Payne
Rep. Charles B. Rangel
Rep. Laura Richardson
Rep. Bobby L. Rush
Rep. Robert C. "Bobby" Scott
Rep. David Scott
Rep. Bennie G. Thompson
Rep. Edolphus Towns
Rep. Maxine Waters
Rep. Diane E. Watson
Rep. Melvin L. "Mel" Watt
Rep. Albert R. Wynn

AMICUS CURIAE BRIEF

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Nos. 07-21 & 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

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INTEREST OF THE AMICI CURIAE

Amici teach and write about constitutional law as it bears on the democratic process. We have studied closely the recent federal and state court opinions concerning allegedly burdensome conditions on the franchise, and the Supreme Court precedents that these decisions purport to apply. With the consent of the parties, we submit this brief in the interest of clarifying the constitutional standard in voter participation cases.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

This is the first case since 1974 that calls upon the Court to adjudicate a claim that a State has unconstitutionally hindered eligible voters' access to the polls.[2] Weighty interests are asserted by both sides. On one side is the right to vote, long recognized by this Court as "preservative of . . . basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). On the other side is Indiana's indisputably powerful interest in preventing voter fraud and protecting public confidence in the integrity of elections, as well as its need for latitude

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[1] The parties have filed blanket letters of consent to the filing of amicus briefs. This brief was not authored, in whole or in part, by counsel for a party, nor did anyone other than *amici* make a monetary contribution to fund it.

[2] The last such case was *O'Brien v. Skinner*, 414 U.S. 524 (1974).

to carry out the election administration responsibilities that the Constitution assigns to the States. Looming in the background is the federal judiciary's institutional interest in "rules to limit and confine judicial intervention" in partisan conflicts over the ground rules of electoral competition. *Vieth v. Jubelirer*, 541 U.S. 267, 301, 307 (2004).

Amici submit this brief with the goal of clarifying two aspects of the standard of review in constitutional challenges to the mechanics of the voting process. It is well understood that scrutiny levels vary with the "character and magnitude" of burdens on voting and associational rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "Severe restrictions" receive strict scrutiny, whereas lesser burdens are subject to a more deferential test. *Id.* What has not been clear to some lower courts—including the courts below—is (1) whether the standard of review for non-severe burdens is tantamount to the ordinary rational basis test, and (2) how to characterize a burden's severity when it concerns eligible voters' access to the polls, rather than candidates' access to the ballot or political parties' rights of association.

As explained more fully below, direct barriers to the casting of a valid, properly counted ballot must at least be *reasonably necessary* to important state interests in the integrity of the political process.[3] The

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[3] A "direct barrier," as that term is used herein, is any requirement with which the voter must comply in order to cast a valid, properly counted ballot.

test of reasonable necessity, though less demanding than strict scrutiny, requires more than hypothetical rationality.

A limited subset of barriers are properly classified as "severe," and hence subject to strict scrutiny. Three precepts, each well grounded in this Court's precedents, ought to guide the scrutiny-level-determining inquiry into severity.

First, a burden is severe if its consequences are severe. In assessing the consequences of direct barriers to voter participation, courts should focus on whether the requirement *unequally burdens* electoral participation by politically identifiable groups of citizens – for example, whether it skews turnout by eligible voters – and not merely on the *number* of voters adversely affected. This follows from the status of the right to vote as a right in service of representative self-government. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators").

Second, in measuring the effects of a challenged voting requirement, the court should compare that requirement to the typical regulatory alternative used in other States. Put differently, the court should focus on the unequal burden on

participation arising from the challenged requirement, as compared with the typical alternative found in other States. This benchmark concretizes the Court's longstanding premise that "ordinary and widespread" regulatory burdens on political participation are usually not considered severe. *See Clingman v. Beaver*, 544 U.S. 581, 593 (2005). It also respects the States' historic and constitutionally assigned role in administering elections. *See, e.g.*, U.S. Const. art. I § 2.

Third, absent reliable statistical evidence about consequences, courts should base scrutiny levels on the presence or absence of *danger signs* which speak to the likelihood of substantial, unjustified effects. *Cf. Randall v. Sorrell*, -- U.S. --, 126 S. Ct. 2479, 2482 (2006) (holding that heightened scrutiny of campaign contribution limits is warranted when there is "strong indication in a particular case, *i.e.*, 'danger signs,' that ... risks [to the democratic process] exist").

Applying this framework to the instant case, this Court should vacate the decision below. As an initial matter, neither the district court nor the Seventh Circuit addressed the feature of Indiana's voter identification regime that is most difficult to justify under any level of scrutiny. We refer here to the peculiar and apparently unique requirement that indigent voters who are unable to obtain qualifying ID without payment of a fee (as well as religious objectors) make *two trips to vote* in each election. On the first trip, the voter swears out an affidavit stating that he is eligible to vote at the precinct in question, whereupon he may cast a provisional ballot. On the

second trip, the voter attests that he has a religious objection to being photographed or is indigent and unable to obtain ID without payment of a fee. The State's failure to make the indigency/religion affidavit available at the polling place appears arbitrary and thus unconstitutional, even under the lowest level of scrutiny that could apply to direct burdens on voter participation.

Alternatively, this Court should vacate and remand because the Seventh Circuit made three errors of law in determining whether to apply strict scrutiny. First, the circuit court looked at the sheer number of voters whom the ID requirement would dissuade from voting, without considering unequal effects on the demographic composition of the voting public. Second, the Seventh Circuit failed to compare Indiana's voter ID requirement to the typical voter identification regime used by other States. Third, after concluding that the Plaintiffs had not proven that the ID requirement would keep more eligible voters than impersonators from casting ballots, the Seventh Circuit failed to ask whether there was a "danger signs" basis for strict scrutiny – notwithstanding that several danger signs appear to be present. These include the Indiana photo ID requirement's extreme outlier status relative to the practices of other States; the law's enactment by a substantially party-line vote of the legislature; and its cumbersome procedure for accommodating indigent voters.

I. Laws Directly Burdening the Right to Vote May Not Be Upheld Unless

Reasonably Necessary to Serve Important Government Interests.

In *Burdick* and in subsequent cases about "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process," 504 U.S. at 433, this Court has held that strict scrutiny applies only if the "character and magnitude" of the burden on voting or associational rights is "severe." *Id.* at 434; *see also Clingman v. Beaver*, 544 U.S. 581, 591-92 (2005) (criticizing a prior decision in which the Court "applied strict scrutiny with little discussion of the magnitude of the burdens imposed," contrary to later cases which "clarified [that] strict scrutiny is appropriate only if the burden is severe"). Much less certain is the level of scrutiny properly applied to non-severe burdens. Although this Court has never used the words "rational basis" or cited rational basis precedents in describing that standard,[4] some lower courts—

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[4] There is one pre-*Burdick* case, *Clements v. Fashing*, 457 U.S. 957 (1982), that cites *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955) (rejecting an equal protection challenge to an assertedly arbitrary state law that regulated opticians while exempting sellers of ready-to-wear glasses, on the sweeping theory that the legislature is free to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). *See Clements*, 457 U.S. at 969, 971. However, the opinion in *Clements* was for a plurality only, and concerned a subject (the eligibility of certain public employees to run for one office while

including, it appears, the district court in the instant case[5]—have understood rational basis to be the test.[6]

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holding another) far removed from direct barriers to the right to vote.

[5] *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 821, 829 (S.D. Ind. 2006) (stating that "the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves," but relying on *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955)). It is not clear what level of scrutiny the Seventh Circuit purported to apply, though the court's analysis was quite deferential. *See Crawford*, 472 F.3d at 952-54. What is clear is that the Seventh Circuit wholly failed to address the provision of the Indiana law most likely to fail the test of reasonable necessity. *See infra* Part II.

[6] The lower courts are split on the standard of review properly applied to non-severe burdens. Some have unambiguously deployed ordinary rationality review. *See, e.g., Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) ("defendants need only show that the enactment of the regulation had a rational basis," given that the burden at issue is "slight"); *Common Cause/Ga. v. Billups*, -- F. Supp. 2d --, 2007 WL 2601438 (N.D. Ga., Sept. 6, 2007) ("the appropriate inquiry is whether the Photo ID requirement is rationally related to the interest the State seeks to further"). Others have clearly stated that it is stricter than the ordinary rational basis test. *See, e.g., McLaughlin v. N.C. Bd. of Elec.*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995)

Those courts have erred. At least where the challenged requirement represents a direct barrier to the voter's casting of a valid, correctly counted ballot, the law must be reasonably necessary to serve an important regulatory interest. Our position that reasonable necessity, not rational basis, is the standard of justification for direct but non-severe burdens on voter participation is supported by (1) the language of *Burdick*; (2) cases before and after *Burdick* in which the Court struck down election procedures without recourse to strict scrutiny; and (3) the distinctive harms that result from direct and hard-to-justify burdens on voter participation, as opposed to burdens on candidates' access to the ballot or political parties' associational freedoms.

(emphasizing "that a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational," and disagreeing with Eighth and Eleventh Circuit decisions which the Fourth Circuit construed as applying ordinary rational basis review in such circumstances); *Reform Party of Allegheny County v. Allegheny County Dep't of Elec.*, 174 F.3d 305, 314-15 (3d. Cir. 1999) (applying an "intermediate level of scrutiny" and striking down a ban on cross-endorsements by minor parties, the burden of which was judged "not severe" yet "not trivial"); *Cotham v. Garza*, 905 F. Supp. 389, 398-401 (S.D. Tex. 1995) (holding that even "limited, not severe" restrictions on the right to vote may not be sustained absent a showing of necessity).

A. *Burdick* Supports the Reasonable Necessity Standard.

The key language from *Burdick* on the level of scrutiny applicable to restrictions on the right to vote states:

> "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it *necessary* to burden the plaintiff's rights.
>
> "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. [W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only *reasonable, nondiscriminatory restrictions* upon the First and

> Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal citations and quotation marks removed; emphasis added).

As this Court has thus clearly stated, the standard of review for non-severe burdens is more demanding than the rational basis test applied to ordinary economic regulations. Per the first paragraph, there must be some consideration of necessity. Per the second, the State's "important regulatory interests" are only *generally* sufficient to justify non-severe, non-discriminatory restrictions. And, most important, there must be a judicial determination that the restrictions at issue really are "reasonable and nondiscriminatory."

B. Cases Preceding and Following *Burdick* Also Support the Reasonable Necessity Standard.

The test applied to non-severe restrictions in *Burdick* and subsequent cases was first articulated in *Storer v. Brown*, 415 U.S. 724 (1974). It is evident from *Storer* and other cases that the Court has understood the standard to have bite against substantially arbitrary regulations without regard to the extent of the burden. This comports with our "reasonable necessity" formulation of the test.

In *Storer*, the Court suggested that a law which disqualified everyone who had voted in the

primary election—including persons who voted a nonpartisan primary ballot—from signing independent candidates' petitions for ballot access in the ensuing general election would be arbitrarily overbroad. *See id.* at 741 ("it would be difficult to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan voters at the primary..."). Also instructive is *American Party of Texas v. White*, 415 U.S. 767 (1974), where the Court held it unconstitutional for a state to print the names of ballot-qualified minor parties on in-person but not absentee ballots. *White*'s equal protection holding turned on the "arbitrary" and "obviously discriminatory" nature of this practice, rather than the application of strict scrutiny. *See id.* at 795.

That the default standard of justification for non-severe burdens is something more than mere rationality is implied as well by *Bush v. Gore*, 531 U.S. 98 (2000). *Bush* concerned the mechanics of the voting process. The *Bush* Court did not determine whether the burden was "severe" within the meaning of *Burdick*, nor did it need to. Under the cases already cited, non-severe burdens are subject to something more than ordinary rational basis review. *Cf. Bush*, 531 U.S. at 105 ("The recount mechanisms . . . do not satisfy the minimum requirement for nonarbitrary treatment of voters...."). At the very least, laws directly restricting participation, including the right to have one's vote counted, must be reasonably necessary to serve an important interest.

C. Even if the Standard for Some Burdens Is Mere Rationality,

Reasonable Necessity Must Remain the Minimum Standard for Direct Burdens on the Right to Vote.

Within the *Storer-Burdick* line are a handful of opinions that apply a relatively deferential standard of justification to certain regulations of the electoral process. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Clingman v. Beaver*, 544 U.S. 581 (2005). These decisions concern ballot access for candidates or the associational rights of political parties. By contrast, in *Bush* as in the instant case, the rules at issue bore directly on the voter's ability to cast a valid, correctly counted ballot.

This distinction matters, because the right to vote protects participatory as well as representational interests.[7] The "participatory" interest refers to citizens being able to vote without unreasonable impediment and to have their votes counted accurately. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1968) ("Any *unjustified discrimination* in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.") (emphasis added). The "representational" interest refers to citizens being able to aggregate their vote with others of like mind,

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[7] *See generally* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

so that their interests and concerns are adequately spoken for in government. *See, e.g., Reynolds v. Sims*, 377 U.S. at 565 ("in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators").

Barriers to ballot access for third parties and independent candidates often implicate voters' representational interests, but they rarely infringe upon voters' participatory interests. Such rules limit voters' choices, not their ability to participate by voting. Accordingly, this Court's ballot access jurisprudence has properly focused on the representational side of the right to vote. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 143-44 (1972) (noting that while the Court had "not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review," strict scrutiny of the candidate filing fees at issue was nonetheless appropriate because the fees "substantially limited [voters'] choice of candidates [in a manner that] obvious[ly] fall[s] more heavily on the less affluent segment of the community"); *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (reiterating that candidacy is not a fundamental right, and that the constitutionality of candidate restrictions therefore depends on "the nature and extent of their impact on voters"); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 974-76 (1998) (describing the representational purposes of the ballot access cases); *cf. Burdick*, 504 U.S. at 437-38 (rejecting the notion that voters have a strong, constitutionally protected

expressive interest in being able to cast a write-in vote for their candidate of choice). Because the voter's participatory interests are not at stake, modest ballot access barriers to third-party and independent candidates warrant relatively deferential review.

By contrast, voter participation interests are manifestly present whenever the State erects a direct barrier to the casting of a valid, properly counted ballot. These interests require, at the very least, that direct barriers be reasonably necessary to serve an important regulatory interest.[8]

Our democracy is founded upon the equal dignity of all citizens who are eligible to vote. *See Kramer*, 395 U.S. at 626 ("[S]tatutes distributing the franchise constitute the foundation of our representative society."); *Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."). At a minimum, due respect for the equal dignity of all voters obliges the state not to create two classes of voters, one authorized to use a convenient voting procedure, the other required to use a more cumbersome procedure, absent a sufficiently

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[8] Nothing in the *Burdick* framework compels identical treatment of modest barriers to candidates' ballot access and modest barriers to voters' casting of a valid ballot. The threshold, scrutiny-level-determining inquiry properly accounts for the burden's "character" as well as its "magnitude." *Burdick*, 504 U.S. at 434.

important interest. *Cf. Am. Party of Texas v. White*, 415 U.S. at 795 ("permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause."). As set forth in Part II, this is just what Indiana appears to have done.

II. This Court Should Vacate and Remand for the Lower Courts to Determine Whether Indiana's Two-Trips Requirement for Indigent Voters and Religious Objectors Is Reasonably Necessary to Serve Important State Interests.

On the existing record, Indiana's photo-ID requirement does not appear to satisfy the reasonable necessity standard. Especially problematic is a peculiar feature of Indiana's law that effectively requires certain voters to make two trips to the polls in each election. Because the lower courts failed to evaluate the two-trips requirement using the proper legal standard, this Court should vacate and remand. Unless the State can come forward with an important regulatory interest that the two-trips voting procedure is reasonably necessary to serve, the law should be found unconstitutional.

Indiana voters who are indigent and unable to obtain qualifying ID without payment of a fee or who object to being photographed for religious reasons may not cast a regular ballot on Election Day. They

may only cast a provisional ballot, which will be counted only if "by noon on the second Monday following election day, the voter appears before the county clerk of courts or the county election board and executes an affidavit that the person is the same as the person who cast the provisional ballot and...is indigent and...unable to obtain proof of identification without payment of a fee ... [or has] a religious objection to being photographed." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 787 (S.D. Ind. 2006) (internal quotation marks omitted); Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5. The indigent voter is thus required to make two trips in every election, the first to the polls on Election Day and the second to the county clerk or election board.

Amici see nothing that prevents the state from including an indigency checkbox ("I am indigent and I was unable to obtain ID without payment of a fee") on the provisional ballot form and thus saving indigent voters – for whom an extra bus trip to and from the county clerk's office may be a significant hardship – from having to make a second trip to validate their vote. Nor is there anything to prevent a similar checkbox for religious objectors. At most, there is a conceivable rational basis for the two-trips requirement (avoiding lines at the polling place), but whether this rationale is enough to satisfy the reasonable necessity standard is doubtful.

It bears emphasis that one of the two classes of citizens subject to two-trips voting is defined by indigency. This is unquestionably relevant to judging whether the requirement is reasonably necessary to advance important state interests. The Constitution

has long been understood to guard against voting burdens whose incidence falls disproportionately upon poor people, even though poverty is not a suspect classification for other equal protection purposes. Firmly established by *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966), this principle has been repeated in numerous cases. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 717-18 (1974) (applying strict scrutiny to "moderate" filing fee requirement for ballot access, because "impecunious but serious candidates may be prevented from running"); *Clements v. Fashing*, 457 U.S. at 964-66 (observing that "heightened" equal protection scrutiny is more likely to be appropriate in ballot access cases if the classification at issue is "based on wealth"); *Anderson v. Celebrezze*, 460 U.S. at 793 ("it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or *economic status*") (emphasis added). *Cf. Hill v. Stone*, 421 U.S. 289, 298 n. 7 (1975) (noting that the voting requirement there subjected to strict scrutiny "may in effect [have] create[d] a property-related classification" with respect to the franchise).[9]

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[9] It is certainly true that that wealth is not generally a suspect basis for classification. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 980 (1973). All of the cases after *Harper* cited in the text post-date *Rodriguez*'s holding on this point; they recognize that burdens on *political participation* by poor people are different.

To be clear, *amici* do not argue that strict scrutiny is triggered by a voting regulation simply because the poor may find it more difficult to comply with than the affluent. But even under the reasonable necessity standard, the fact that a voting requirement particularly burdens the indigent must be factored into the court's assessment of necessity. In this case, the challenged statute acknowledges through its indigency "exception" that a generally applicable requirement imposes a disproportionate burden on a class of voters defined by wealth or income. Due respect for these voters' equal dignity requires that the corresponding accommodation not be needlessly cumbersome.

Neither court below passed on the two-trips issue. It was not even mentioned in the Seventh Circuit's opinion.[10] The district court noted the problem but declined to consider it and, moreover,

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[10] The issue was fairly raised. *See* Brief and Required Short Appendix of Plaintiffs-Appellants, Indiana Democratic Party and Marion County Democratic Cent. Committee at 25-26, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (2007) (Nos. 06-2218, 06-2317); Brief and Short Appendix of Appellants Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition on Housing and Homeless Issues, Joseph Simpson at 40, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (2007) (Nos. 06-2218, 06-2317).

improperly understood the legal standard to be mere rationality.[11] Accordingly, this Court should vacate the decision below and remand with a clarifying statement regarding the legal standard.

III. In Deciding Whether to Apply Strict Scrutiny, the Seventh Circuit Made Three Critical Errors That Independently Warrant Remand.

Because the decision below may be vacated on the ground that the lower courts failed to analyze the indigency and religious objector accommodation using the reasonable necessity standard, this Court need not resolve the question of whether strict scrutiny

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[11] The district court mentioned in a footnote that the two-trips problem (as to religious persons) had been raised in an amicus brief filed by the League of Women Voters, but the court declined to consider the argument on the grounds that it had not been "adopted" by the plaintiffs; that it was hypothetical (no individuals before the court had to comply with the requirement); and that it was not "clear that the [League of Women Voters] or any of the Plaintiffs have standing to raise such a challenge." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d at 830 n.85. But the standing worry is misplaced, at least on the theory of standing adopted by the Seventh Circuit; the "hypothetical" objection applies equally to every other aspect of facial, pre-implementation challenges; and the "not adopted by the parties" rationale would render almost all amicus briefing superfluous.

should have been applied to the Indiana voter ID requirement. However, in the event that the Court reaches this question, we set forth the test that should govern this determination and explain how the Seventh Circuit erred in its analysis.

The fulcrum issue is whether the "character and magnitude" of the burden on voting and associational rights is "severe." This Court's precedents support an approach to burden characterization with three defining features.

First, consequences matter. The most important consequence in voter participation cases is the degree to which the challenged requirements impose an unequal burden on certain classes of voters, by skewing the political demographics of voter participation relative to the population of eligible voters. This is so because right to vote serves not only the individual's interests in participating as such, but also his or her interest in being governed by a fairly elected legislature. Regulations that impose substantially unequal burdens on the voting public are therefore much more harmful than regulations with an equal impact across demographic groups. The inquiry we propose is grounded in a long line of constitutional voting rights precedents that attend to the distribution of burdens among politically identifiable groups of citizens, including those defined by income, place of residence, ideology, and race.

Second, for purposes of determining the appropriate level of scrutiny, the burden imposed by the challenged practice should be compared to typical alternatives used by other States. In other words, the typical practice of states should serve as a

benchmark, against which the challenged practice is judged. This benchmark norm, implicit in this Court's precedents, ought to be formally incorporated into the test for elevated scrutiny so that lower courts are duly focused in determining whether to intervene in disputes over the administration of elections.

Third, when conclusive empirical evidence about the effects of a particular practice is unavailable, as will often be the case, courts should key scrutiny levels to the presence or absence of objective "danger signs" which indicate whether the challenged requirement is likely to have an unequal burden on groups of voters defined by common political interests. *Cf. Randall v. Sorrell*, -- U.S. --, 126 S. Ct. 2479, 2492-93 (2006) (relying on danger signs to negate the ordinary presumption of permissibility associated with campaign contribution limits).

As explained below, the Seventh Circuit failed to adhere to any of these precepts in determining the appropriate level of scrutiny. The court considered the number of eligible voters dissuaded from voting by the photo ID requirement, but not its skewing effect on the demographics of electoral participation. In addition, the court failed to compare Indiana's identification requirement to the typical practice of other States. Finally, the court failed to consider several danger signs that ought to be consulted in the absence of reliable statistical evidence about consequences.

D. The Seventh Circuit Erred in Not Focusing Its Burden Analysis on

Whether Indiana's Photo ID Requirement Imposes an Unequal Burden on Groups of Voters Defined by Common Political Interests.

The Seventh Circuit correctly recognized that the burden of a voting requirement is best measured by its consequences. *Crawford*, 472 F.3d at 952-54. *Cf. Storer v. Brown*, 415 U.S. 724, 742 (1974) (noting that for purposes of judging the severity of ballot access restrictions on independent candidates, "it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not"). But the circuit court erred in treating each lost vote just like the next, *i.e.*, in presuming that the proper level of scrutiny is simply a function of the total number of excluded voters (less the number of cases of fraud prevented). *See Crawford*, 472 F.3d at 952-54. More specifically, the court failed to focus its burden analysis on whether the challenged law imposed unequal burdens on certain voters that would skew voter participation.[12]

Such effects matter because the right to vote is not merely a signifier of the citizen's status as a full member of the political community. It is also a means of protecting the citizen's interest in being

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[12] In ruling on standing, the court recognized that the Indiana law might disproportionately burden Democratic voters, *Crawford*, 472 F.3d at 951, but when the court reached the merits such concerns were not part of the court's assessment of the standard of justification that the law must satisfy.

governed by representatives who are accountable to the normative electorate, comprised of all voting-eligible citizens.[13] *Cf.* U.S. Const. art. I § 2 & amend. XVII (providing, respectively, that members of the House of Representatives and the Senate are to be chosen by the people of the several States). To the extent that a voting regulation causes the political demographics of the voting public to deviate from that of the normative electorate, citizens who belong to the underrepresented groups suffer a representational harm.

This idea permeates much of this Court's constitutional jurisprudence on voting rights and political association. It extends back to *Reynolds v. Sims*, 377 U.S. 533 (1964), which recognized that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." *Id.* at 565. A few years later, in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court took another step toward solidifying the representative-participation norm, pronouncing that legitimate "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.* at 666.

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[13] It is well settled that the normative electorate includes all adult, citizen, non-felon residents of the jurisdiction in question. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1968); *Richardson v. Ramirez*, 418 U.S. 24 (1974).

In *Gordon v. Lance*, 403 U.S. 1 (1971), the Court rejected a *Reynolds*-based challenge to a supermajority voting rule for bond referendum elections, reasoning that "no independently identifiable group or category [of voters] favors bonded indebtedness over other forms of financing." *Id.* at 5. Because the voting rule did not disadvantage any discernable group of citizens defined by common political interests, there was no constitutionally cognizable burden. By contrast, the filing fees struck down in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), were thought to disproportionately impede candidates who would appeal to low-income voters. Looking back on this line of decisions, the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), inferred: "[I]t is especially difficult for the State to justify a restriction that limits political participation by *an identifiable political* group whose members share a particular viewpoint, associational preference, or economic status." *Id.* at 793 (emphasis added).

E. The Seventh Circuit Erred in Failing to Compare the Effects of Indiana's Photo ID Requirement to Typical Regulations of Other States.

The effects of a challenged law cannot be ascertained without comparing the law to some alternative. Because "there must be . . . substantial regulation of elections if they are to be fair and honest," *Anderson*, 460 U.S. at 788, it is impractical to use a no-regulation benchmark for purposes of gauging the severity of burdens on the right to vote. We suggest that the effects of the challenged

requirements should be compared to those that would arise from using typical regulations found in other States.

Though it was not explicit about this, the Seventh Circuit appeared to treat Indiana's previous voter identification requirements as the only relevant regulatory benchmark. *See Crawford*, 472 F.3d at 952-54 (weighing the number of eligible voters excluded against the number of impersonations prevented by the ID requirement). This misses, however, what may be the most relevant comparison. In determining the degree of burden imposed by a state rule of election administration, that rule should be compared to the typical practices of the other States. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189, 196-97 (1986) (reversing the Ninth Circuit for measuring ballot access burdens relative to the previous state law).

This approach honors the States' constitutionally assigned responsibility for managing elections, *see, e.g.*, U.S. Const. art. I § 2. It also concretizes the Court's longstanding premise that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases." *Storer v. Brown*, 415 U.S. at 730; *see also Clingman v. Beaver*, 544 U.S. at 593 (cautioning that "ordinary and widespread" voting requirements should not be deemed severe). Under this approach, practices that are within the mainstream are less likely to be found unconstitutional. In contrast, a state law that imposes exceptional burdens on a definable class of

voters, relative to other states, will face a greater burden of justification.

F. The Seventh Circuit Erred in Failing to Recognize the Place of "Danger Signs" in Determining the Proper Level of Scrutiny.

The record in this case is more slender than might be desired. Plaintiffs have presented little conclusive evidence proving the precise effects of Indiana's law on different groups of voters. At the same time, the State of Indiana has not established that impersonation fraud is a substantial problem. Under these circumstances, the courts must ask what presumptions ought to govern.

The Seventh Circuit imposed a high evidentiary standard on the plaintiffs, requiring them to "show[]"—presumably, with reliable empirical evidence[14]—that the ID requirement would keep more eligible voters than impersonators from casting ballots. *Crawford*, 472 F.3d at 953-54. At the same time, the court indulged in speculation about the likelihood of impersonation fraud. *See id.* at 953.

A different approach is needed. When judges intervene or decline to intervene based of their own hunches about the likely consequences of challenged election laws, they render the judicial system

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[14] The Seventh Circuit agreed with the district court that the Plaintiffs' principal empirical evidence was unreliable. *See Crawford*, 472 F.3d at 952.

vulnerable to the charge that case outcomes are determined by judges' partisan or ideological preferences. Insisting on hard evidence thus has obvious attractions. But a doctrine that required plaintiffs to introduce statistical proof of the challenged requirement's unequal burden would demand too much. Voter turnout is affected by many factors, including the competitiveness of elections, campaign spending, other races on the ticket, the presence of initiative or referendum questions, and more. Disaggregating the effect of a particular requirement on turnout may therefore be impracticable in many cases.

There is a third way, an alternative both to case-by-case judicial speculation and to unrealistic demands for social scientific proof: the use of *presumptions* concerning the likely effect of the challenged requirement and its means-end fit. This approach is implicit in this Court's constitutional jurisprudence about the voting process. To illustrate, regulations that place an express financial or property ownership condition on political participation always elicit strict scrutiny, as do regulations concerning the internal structure and organization of political parties. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Eu v. S.F. County Democratic Cent. Comm.*,, 489 U.S. 214 (1989). A plaintiff in such a case need not make any further empirical showing about the magnitude of the associated burden. Using the language of *Burdick*, one might say that the regulation is conclusively presumed to create a severe, scrutiny-elevating burden because of the form that it takes. *See generally* Christopher S. Elmendorf, *Structuring*

Judicial Review of Electoral Mechanics: Explanations and Opportunities, 156 U. PA. L. REV. (forthcoming Dec. 2007), draft available at http://ssrn.com/abstract=980079 (draft at 24-28) (discussing burdens "severe in kind").

Other severity presumptions are rebuttable, even before the court reaches the strict-scrutiny stage of justification. Consider the seminal case of *Storer v. Brown*, 415 U.S. 724 (1974), which is fairly read as establishing both a substantive performance standard for ballot access regimes and a set of readily verified evidentiary presumptions with which to implement it.[15] The performance standard is that ballot access restrictions must not be so severe that "reasonably diligent" third-party and independent candidates qualify only "rarely." *Id.* at 742. The corresponding evidentiary presumptions are tied to the available pool of prospective signatories (persons eligible to sign the candidate's or party's petition). Signature requirements of 5% or less are presumed permissible, *see id.* at 738-39, whereas requirements "approach[ing] 10%" trigger demanding judicial inquiry into the necessity of the restrictions, *see id.* at 743-44. This framework provides useful guidance for legislatures, and allows judges to dispose of many ballot access cases quickly. At the same time, it leaves open the possibility of outcome-based challenges to requirements of less than 5% if, over a long period of time, third parties or independents

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[15] For an elaboration of this reading of *Storer*, see Elmendorf, *supra*, draft at 30-33.

have qualified for the ballot at exceptionally low rates.[16]

We doubt that scrutiny levels in most constitutional challenges to voting requirements can be usefully determined using severe-in-kind or numerical-cutoff presumptions. More nuanced presumptions are needed. The way forward is well illustrated by Justice Breyer's plurality opinion in *Randall v. Sorrell*, -- U.S. --, 126 S. Ct. 2479 (2006), a case about campaign contribution limits. There are notable commonalities between the problem the Court faced in *Randall* and the problem it faces in this case. Campaign contribution limits are presumptively permissible, see *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 386-88 (2000); so too are most administrative regulations of the voting process, *cf. Storer*, 425 U.S. at 730 ("as a practical matter there must be a substantial regulation of elections *if they are to be fair and honest*") (emphasis added). Yet as Justice Breyer observed in *Randall*, it is also

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[16] For another example of a strong but rebuttable quantitative presumption in the constitutional jurisprudence of voting rights, consider malapportionment claims against state and local government districting plans. *Compare Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (deviations of less than 10% are prima-facie justified by "legitimate objectives") *with Cox v. Larios*, 542 U.S. 947 (2004) (summarily affirming district court opinion which struck down a 10%-compliant plan after finding that the plaintiffs had overcome the presumption of validity).

necessary for the courts to "recognize the existence of some lower bound," lest contribution limits end up threatening democratic accountability. 126 S.Ct. at 2492.

This is also true of voter identification laws: a cumbersome identification requirement that skews participation by eligible voters, while doing little to reduce the number of ineligible votes, would undermine democratic accountability. The *Randall* plurality's solution was to look for "strong indication in a particular case, *i.e.*, 'danger signs,' that . . . risks [to the democratic process] exist (both present in kind and likely serious in degree)." *Id.* The discovery of a danger sign would negate the otherwise applicable presumption of permissibility, requiring the court to "review the record independently and carefully with an eye toward assessing the...proportionality of the restrictions." *Id.* In *Randall*, Justice Breyer found such a danger sign in the fact that Vermont's contribution limits were the lowest in the Nation, and well below any that the Court had previously sustained. *Id.*

Similarly, Indiana's identification requirements for voting appear to be the most stringent in the Nation. According to *electionline.org*, a nonpartisan clearinghouse of information about election administration, only three States—Georgia, Florida, and Indiana—currently require photo identification as a prerequisite to casting a regular ballot. (Four other States request photo ID, but allow voters without an ID to sign an affidavit instead; another eighteen states require identity documentation but do not insist on photographic

ID.[17]) *See* Voter ID Laws, http://www.electionline.org/Default.aspx?tabid=364.

Georgia's and Florida's photo ID requirements are less stringent than Indiana's. In Georgia, any registered voter who avers that she lacks other qualifying ID and who furnishes minimal evidence of her identity (as little as a completed voter registration form or precinct card) will be provided with a free, State-issued photo ID card. *See Common Cause/Ga. v. Billups*, -- F. Supp. 2d --, 2007 WL 2601438 at *8-13 (N.D. Ga. Sept. 6, 2007). In addition, all Georgians registered to vote are entitled to vote absentee, without ID. *Id.* at *25-26. In Florida, the range of permissible forms of photo ID is substantially broader than in Indiana. *Compare* Fla. Stat. Ann. § 101.043(1) *with* Ind. Code § 3-5-2-40.5. More important, the Floridian without ID who casts a provisional ballot need not make two trips to get his or her vote to count. Provisional ballots enjoy a presumption of validity under Florida law, and will be counted unless (1) a preponderance of the evidence shows that the person named on the ballot was not entitled to vote at the precinct where the vote was cast, or (2) the signature on the provisional ballot envelope does not match the signature on the voter's registration card. Fla. Stat. Ann. § 101.048(2). In summary, while many States have required voters to

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[17] One other state, Missouri, has required a photo ID as a prerequisite to voting, but this requirement was struck down on state constitutional grounds in *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

provide some evidence of their identity, none go so far as Indiana in limiting the permissible forms of ID.

Amici submit that a robust danger-signs jurisprudence would also account for objective factors which tend to suggest that the challenged requirements were enacted for the purpose of disproportionately burdening some voters. As this Court has recognized, laws enacted for illegitimate reasons generally will have their intended effect. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 580 (2000) ("It is unnecessary to cumulate evidence of [the blanket primary's allegedly severe impact on political parties' ability to nominate their candidates of choice], since, after all, the whole *purpose* of Proposition 198 was to favor nominees with 'moderate' positions.").

All of this provides much cause for skepticism about the Indiana voter ID mandate. Its extreme outlier status, relative to the practices of other States, is not the only danger sign. Equally cautionary is the partisan lineup of votes behind the law's enactment (all Republicans voted for it, and all Democrats against it), combined with the peculiar and seemingly punitive two-trips accommodation for indigents unable to obtain qualifying ID without payment of a fee. These factors suggest that an exclusionary motive may have been afoot, given that poor people are likely to vote for Democrats. *Cf. Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("Fencing out from the franchise a sector of the population *because of the way they may vote* is constitutionally impermissible.") (emphasis added; internal citations and quotation marks omitted). Taken together, and

considered alongside empirical studies which show that low-income and minority citizens are comparatively less likely to have a driver's license,[18] these observations call into serious question whether Indiana's photo ID requirement really is a "reasonable, nondiscriminatory" restriction rather than a "severe" one.

It bears emphasis that the danger-signs predicate for heightened scrutiny does not require this Court or any other to conclude that Indiana's Republican lawmakers acted in bad faith when voting for the photo ID requirement. The purpose of the inquiry is not to impugn legislators' motives. The aim is simply to establish whether there are enough signs of aberrance to warrant heightened scrutiny.

It is open to this Court to address the apparent danger signs and, if appropriate, to apply strict scrutiny. *Amici* believe, however, that the better course would be vacatur accompanied by a clarifying statement about the danger-signs approach. *Cf. Ga. v. Ashcroft*, 539 U.S. 461 (2003) (similarly disposing

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[18] Matt A. Barreto, et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* (Nov. 8, 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf; Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), *available at* http://vote.caltech.edu/VoterID/CitizensWithoutProof.pdf.

of a case presenting major unresolved questions about the retrogression standard under Section 5 of the Voting Rights Act). The correct application of the danger-signs model in the instant case is likely to require further factfinding. The district court made no determination, for example, regarding the stringency of Indiana's voter-identification requirements relative to those in place in other States. Although it appears to us that Indiana's requirement is the most restrictive in the nation, we suggest that the district court assess this matter in the first instance and then decide whether strict scrutiny is warranted on account of danger signs.

CONCLUSION

We urge this Court to vacate the decision below and remand for further proceedings. The Court should clarify that direct, non-severe barriers to voter participation are permissible only if *reasonably necessary* to important regulatory purposes.

Alternatively or in addition, this Court should vacate and remand with instructions for determining whether elevated scrutiny is warranted. In deciding whether to apply strict scrutiny, the lower court should focus on the unequal burdens imposed on voters. It should compare the burdens imposed by Indiana's practice to the typical alternative in other States. And, if reliable empirical evidence about consequences is unavailable, the level of scrutiny should turn on the presence or absence of objective "danger signs" suggesting that the requirement's constitutional costs are likely to outweigh its benefits.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Nos. 07-21 & 07-25

In The Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* EVERGREEN FREEDOM FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

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INTEREST OF *AMICUS CURIAE*

The Evergreen Freedom Foundation, founded in 1991, is a non-partisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington.[1] The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation advocates reforms to increase election security, transparency and accountability through its Voter Integrity Project, both in Washington state and nationwide. These reforms are based on an extensive investigation of Washington's election system by Foundation staffers, who have been asked to testify on their findings and the resulting recommendations by county councils, state legislative committees, the congressional Committee on House Administration, and national policy organizations such as the American Legislative Exchange Council and the National Freedom of Information Coalition. The Foundation is routinely consulted by state and national media for information and opinions on election reform topics.

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[1] The parties have filed letters consenting to the filing of any *amicus curiae* brief with the Clerk of the Court. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or counsel, made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The State of Indiana has imposed a reasonable, nondiscriminatory restriction on the voting process in order to advance two important interests: the integrity of the election process and the electorate's confidence in election security. This brief examines both interests and the extent to which they justify a photo identification law.

This Court has recognized that security and confidence are compelling interests. States are authorized to regulate the "times, places, and manner" of holding elections, and this encompasses the protection of voters, prevention of fraud or corruption, and any other safeguards necessary for the orderly conduct of elections.

Voter fraud is a serious problem in U.S. elections. Panels of national experts, academic research, the Department of Justice and evening news reports all confirm its existence. The difficulty of apprehending fraudulent voters, the rarity of prosecutions and bloated voter registration rolls all contribute to the potential for fraud. And even isolated voter fraud can affect close elections, causing public confusion, delayed results and drawn-out legal contests. Additionally, each fraudulent vote dilutes a legitimate voter's ballot, a harm that is nearly impossible to remedy after the fact. Therefore, states can and should adopt preemptive measure to secure elections against voter fraud. Photo identification requirements secure elections at the most basic level: they ensure that

only legitimate voters vote. The State of Indiana was therefore justified in using this method to combat voter fraud in the type of voting used by ninety percent of its voters.

Ensuring ballot integrity is compelling, but preserving public confidence in the election process is equally important. Citizen participation in our form of representative democracy is critical, and voter fraud (or even the appearance thereof) harms lawful participation. Voters who recognize that ballots are not secure lose confidence in the conduct of elections. Rather than participating in a farce, honest citizens decline to vote, and lack confidence in political leaders appointed through our electoral process. Confidence in the election system, once lost, is extremely difficult to restore. Research suggests that photo identification laws enhance public confidence in election security because voters believe showing photo identification helps prevent fraud. Thus, Indiana is justified in requiring photo identification in order to preserve and build public confidence.

Indiana is not alone in advancing election security and voter confidence through photo identification requirements. Many other states, concerned with voter fraud or the appearance of corruption, have passed photo identification laws or are considering measures similar to Indiana's law.

ARGUMENT

I. INDIANA HAS A SPECIFIC, COMPELLING STATE INTEREST IN PREVENTING VOTER FRAUD

Far from being a "nonexistent problem," voter fraud is a substantiated danger that can severely harm an election system. Indiana had a compelling, specific state interest in enacting a verification requirement to protect against fraud in the type of voting used by the vast majority of its citizens.

A. States have a compelling interest in securing their election process.

A state's authority to regulate the conduct of elections is found in Article I, Section 4 of the U.S. Constitution: "The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof. . . ." This Court has held that "times, places, and manner" encompasses regulations "in relation to . . . protection of voters, prevention of fraud and corrupt practices . . . in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 363 (1932). More recent cases echo this interpretation. In *Burdick v. Takushi,* 504 U.S. 428, 441 (1992), the Court agreed that states must structure the electoral process "to maintain the integrity of the democratic system" (quoting *Anderson v. Celebrezze,*

460 U.S. 780, 788 (1983)). In other election-related decisions the Court termed this interest in preserving the integrity of the elections process a "compelling interest." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 231 (1989); *American Party of Texas v. White*, 415 U.S. 767, 783 (1974).

B. Voter fraud is a significant threat to election integrity, even in small amounts, because of the impact it can have on close elections.

Extremely close elections happen often in local, state and national elections. When they happen, the results are closely scrutinized by candidates, parties, the media and the public. If the margin of victory in a close election partly or wholly consists of illegal ballots, the outcome of the election is thrown in doubt and the effect upon the election system can be very damaging.

While the Petitioners have attempted to downplay the amount of voter fraud that occurs, the severity of fraud should not be measured by the total number of ballots cast, but by the margin of victory in a race. That calculation reveals that voter fraud can quickly become a major problem, even if the actual number of fraudulent ballots is only a small percentage of the total votes.

Washington state's gubernatorial election of 2004 illustrates the ill effects of fraudulent ballots in a close race. Republican candidate Dino Rossi won the

governor's seat in the initial vote count by 261 votes out of 2.8 million tabulated. State rules required a recount, which Mr. Rossi also won by 42 votes. A second recount was conducted by hand at the request of the losing candidate, Democrat Christine Gregoire. She won by a total of 133 votes. Court's oral decision, *Borders v. King County*, No. 05-2-00027-3, at 9 (Wash. Super. Ct. 2005).[2]

During this recount process, reports of fraudulent ballots and miscounted votes started to circulate among party activists and the media. Soon after the election was certified Mr. Rossi filed an election contest action, alleging that the accurate results of the election could not possibly be known due to the large numbers of fraudulent ballots. *Borders v. King County*.

The trial court found that "1,678 illegal votes were cast," over thirteen times the margin of victory in the race. *Id.* at 8.[3] Despite this finding, the court

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[2] *Available at* http://www.secstate.wa.gov/documentvault/CourtsOralDecision-629.pdf.

[3] See Brief of the Petitioner Indiana Democratic Party at 47. Petitioner claims there were only 19 instances of voter impersonation fraud in Washington's 2004 governor's race, and that none would have been prevented by a photo identification requirement. This is a gross understatement. The court in the election contest found there were at least 24 instances of voter impersonation, and in another 252 instances provisional or regular ballots were illegally cast for a voter with missing or unverified registration information. *Borders v. King County*, page 8. A photo identification requirement would have greatly

(Continued on following page)

was unable to determine which gubernatorial candidate these votes were credited to, and therefore could not overturn the results of the race. *Id.* at 10. So while the number of illegal votes was small in comparison to the total votes cast, it was enormous in connection to the results of the election. As detailed in Section II, this outcome not only made it impossible for voters to know who really had won the election, but caused a plunge in voter confidence in Washington state that persists to this day.

Washington is not alone in having razor-thin elections. In 2001 a gathering of election experts headed by former president's Jimmy Carter and Gerald Ford found:

> In presidential elections since 1948, nearly half of all the states have had at least one occasion when the winner of their electoral votes was decided by less than one percent of the vote. In 1948 Truman carried California and Illinois each by margins of less than 1%; had he lost both states the election would have gone to the House of Representatives for a decision. In 1960 the winner in six

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eased concerns over the failure to verify the identity of the voters who cast these ballots. A photo identification requirement would also have made a difference in other instances of in-person voter fraud in the 2004 race that were discovered after the election contest ended. See Memorandum from Jefferson County Auditor to Jefferson County Prosecutor Juelanne Dalzell, March 7, 2006, *available at* http://soundpolitics.com/JeffersonDoubleVoters20060322.pdf.

> states was decided by this tiny margin, more than enough to have changed the outcome. In 2000 the winners in four other states, in addition to Florida, was decided by less than 1% of the vote. In a given election, past experience indicates a 90% chance that at least one state will have a presidential election decided within such a 1% technological margin of error. Very close elections are also common in elections for other federal offices or for governor. Since 1948 half of the states have had at least one senatorial race decided by less than 1% of the vote; some have had as many as three such narrowly decided senatorial races.[4]

No state is immune to close elections. States have a compelling interest in avoiding the public confusion, delayed results and drawn-out legal battles that occur when a close election is tainted by illegal ballots.

Further examples of this can be seen in recent elections in Indiana, Tennessee and Alabama. A hotly-contested mayoral race in Indiana was reversed by the Indiana Supreme Court in 2004 because the incumbent had engineered the casting of hundreds of illegal ballots in his favor. *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004). A Tennessee state senator

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[4] National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 51, August 2001, *available at* http://www.tcf.org/Publications/ElectionReform/99_full_report.pdf.

elected in 2005 by 15 votes was ousted after election officials found a number of illegal ballots had been cast in one Memphis precinct.[5] And after a year-long legal battle, a 2004 mayoral race in Greensboro, Alabama was overturned after it was discovered hundreds of illegal ballots had been cast for the apparent victor. *Washington v. Hill*, 960 So.2d 643 (Ala. 2006).

Even when an election is not overturned by illegal ballots, as in the Washington gubernatorial race, close scrutiny by the press magnifies the public perception of fraud and the damage to the election. One reporter for the *Seattle Times* wrote over one hundred stories on the controversy in the months following the 2004 election, and he was only one of many reporters from a dozen newspapers following the story.[6]

C. States can and should take preventative and preemptive measures to secure elections against voter fraud.

In 1982 this Court held it would not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil

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[5] Travis Loller, *Senate votes Ford out*, THE TENNESSEAN, April 20, 2006.

[6] David Postman, Remarks at the 2007 NFOIC Annual Summit session on Election Transparency (May 11, 2007), audio transcript *available at* www.tvw.org.

feared." *Federal Election Commission v. National Right to Work Committee,* 459 U.S. 197, 210 (1982). While that case dealt with preventing campaign finance corruption, legislatures must make the same type of determination in attempting to prevent corruption in the election process. States should not have to wait until voter fraud appears in their own backyard before addressing it. Indiana chose to preemptively counteract the danger of voter fraud by enacting a photo identification requirement.[7] This decision was not made in a vacuum, but was done based on the bad experiences of other states and the recommendations of election experts. *Crawford v. Marion County Election Board,* 472 F.3d 949, 953 (7th Cir. 2007). Indiana also followed the lead of Congress's mandate for voter identification in the 2002 Help America Vote Act, just taking it one step further. 42 U.S.C. § 15483(b) (2002).

Washington state is a good example of why a state should follow well-thought-out recommendations to improve election security, even with no immediate crisis.

Washington state allows voters to choose a "permanent absentee" status, meaning a ballot will automatically be mailed to them prior to every election. This places great dependence on the accuracy of the county voter rolls, since counties must keep up with voter status changes without any subsequent

[7] Indiana Senate Enrolled Act 483 (2005).

input from voters. In 2006, in response to the requirements of HAVA, Washington created a statewide voter database and began checking it for duplicates, felons and deceased voters. RCW 29A.08.651. In the first year nearly 185,000 ineligible registrations were removed from the rolls, many of whom were on the rolls during the 2004 gubernatorial race.[8]

Back in 2001 the Carter-Ford Commission had recommended states create a statewide voter roll and require ID for voter registrations.[9] If Washington had acted on this recommendation in 2002, as requested by its Secretary of State, there's little doubt there would have been fewer illegal ballots in the 2004 gubernatorial race.[10]

In a more distant Washington election controversy, this Court examined the constitutionality of a state law requiring minor party candidates to receive at least one percent of all votes cast for their office in the primary election in order to be on the general election ballot. *Munro v. Socialist Workers Party*, 479

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[8] Office of the Washington Secretary of State, *State's first consolidated list of registered voters combats voter fraud*, February 20, 2007, *available at* http://www.secstate.wa.gov/office/osos_news.aspx?i=FenKyLcm7pnRC0P0kcR9kA%3d%3d.

[9] See *To Assure Pride and Confidence in the Electoral Process*.

[10] Office of the Washington Secretary of State, *Statewide Voter Registration System Adopted*, March 12, 2002, *available at* http://www.secstate.wa.gov/office/osos_news.aspx?i=eO0fOXxC0uvWrOQMi%2ffBPw%3d%3d.

U.S. 189 (1986). The state enacted the law to prevent voter confusion, but the plaintiffs argued the state had no interest due to a lack of any evidence of such confusion. Reinforcing a state's authority to preemptively enact security measures, this Court stated, "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively. . . ." *Id.* at 195. Preventing such action, the Court said, would "necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* Far better to allow a state to act first to prevent damage, as Indiana did with its photo identification requirement.

D. Errors in a state's voter roll make voter fraud easier, and increase the need for strong identity verification requirements.

Indiana's voting roll is full of ineligible voters and data errors, judging by the district court's finding that there are substantially more registrations on the roll then registered voters in the state. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775 (S.D. Ind. 2006). This problem has also plagued other states, including Washington. After two years of database cleanup and the removal of over two hundred thousand ineligible registrations, Washington's

Secretary of State is still finding new types of errors.[11] When Indiana legislators enacted the photo identification requirement in 2005 the state voter database was still a work in progress,[12] and even though Indiana officials have agreed to a settlement with the Department of Justice requiring them to clean up the rolls, it will take years to fully accomplish.[13]

Election researchers who have studied the accuracy rates of voter rolls and related databases conclude, "states must account for, and avoid compounding, the unavoidable limitations of databases and record matching procedures."[14] A federal district court in Washington state agreed with this warning, striking down a state law requiring voter registration information to match a drivers' license or Social Security Administration record. The court thought database errors created too great a risk of preventing eligible voters from registering. *Washington Association of*

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[11] See *State's first consolidated list of registered voters combats voter fraud, supra.*

[12] Wanda Burnett, *Voting process upgraded in county, state*, VERSAILLES REPUBLICAN, Dec. 29, 2005.

[13] U.S. Department of Justice, *Justice Department Announces Agreement to Protect the Integrity and Accuracy of Indiana's Voter Registration List*, June 27, 2006, *available at* http://www.usdoj.gov/opa/pr/2006/June/06_crt_398.html.

[14] Justin Levitt, et al., *Making the List: Database Matching and Verification Processes for Voter Registration*, Brennan Center for Justice, March 24, 2006. The author of the study submitted an *amicus curiae* brief in support of the Petitioners.

Churches v. Reed, 492 F.Supp.2d 1264 (W.D. Wash. 2006).

A Milwaukee law enforcement task force investigating alleged voter fraud after the 2004 general election found that database errors also make it tough to uncover election crimes: "Simply put: it is hard to prove a bank embezzlement if the bank cannot tell how much money was there in the first place. Without accurate records, the task force will have difficulty proving criminal conduct beyond a reasonable doubt in a court of law."[15]

Indiana's dilemma is just as severe. The Secretary of State is working to clean up the state's voter roll, but the task will take much time and effort. Even when completed, the data in the voter roll will never be one hundred percent accurate. Indiana, therefore, is justified in strengthening ballot security to ensure database errors do not lead to voter fraud, as they did in Milwaukee and Washington.

E. Signature verification and criminal penalties are inadequate to prevent voter fraud.

Prior to enactment of the photo identification requirement, Indiana's poll voting security consisted

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[15] *Preliminary Findings of Joint Task Force Investigating Possible Election Fraud*, May 10, 2005, *available at* http://www.wispolitics.com/1006/electionfraud.pdf.

of signature verification and the deterrence effect of criminal penalties for voter fraud. HAVA added a requirement that first-time voters who register by mail must produce a piece of voter identification ranging from a drivers' license to a copy of a utility bill. 42 U.S.C. § 15483(b). While Petitioners claim these security measures are adequate, making a photo identification requirement unnecessary, the experience of other states has shown otherwise.[16]

1. The complexity of signature verification and non-uniform application make it an inadequate security measure.

Signature verification is inadequate because it's not uniform, and because doing it properly requires extensive forensic training not possessed by most poll workers. Indiana Code § 3-11-8-25.1(i) states, "In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration. . . ." Poll workers only compare signatures if there is "doubt" about a voter's identity, making application of the security measure spotty and subjective.

Even if application were uniform, the high level of knowledge required to properly verify signatures, the fact that few poll workers possess this knowledge

[16] Pet. at 42.

and the tight time constraints of an election reduces the effectiveness of signature verification.

These limitations were highlighted in Washington state's 2004 election when many illegal ballots were cast that should have been stopped by the signature verification process. In dozens of instances, ballots with signatures that clearly didn't match registration records were counted. This failure is likely explained by a post-election review from a certified Washington member of the National Association of Document Examiners, who warned that "comparing signatures to determine authenticity is an established field of forensic science."[17] Temporary election workers with just a few hours of training who review a high volume of ballots in a short time period cannot detect all non-matching signatures.

This differs from Indiana's absentee ballot system, where the limited numbers of mail ballots allow experienced personnel extra time to check signatures, uniform signature checking is required by law, and the absentee ballot request form provides a secondary matching source. Ind. Code § 3-11-10-4(a). But for the ninety percent of Indiana voters who use a polling place, signature checking is an inadequate security measure.[18]

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[17] Hannah McFarland, *Comparing signatures is a science*, SEATTLE P-I, Nov. 1, 2005.

[18] Indiana Secretary of State's Office, *2006 General Election Turnout and Registration*, November 7, 2006, *available at* http://

(Continued on following page)

2. The rarity of prosecutions make criminal penalties an inadequate deterrent.

The deterrence effect of criminal penalties is also inadequate, because tight resources and other priorities make prosecutions too rare. As Judge Posner stated in the appellate decision, "the absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator." *Crawford,* 472 F.3d at 953.

The election of 2004 in Washington state demonstrated this problem. Based on extensive research from the state Democratic and Republican parties, the judge concluded that 1,401 felons cast illegal ballots in the election. *Borders v. King County,* at 9. Not one of these felon voters was prosecuted.[19] Even in blatant cases, such as when the Thurston County (Olympia) prosecutor declined to file charges against a felon voter who was both a disbarred attorney and a former political consultant.[20]

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www.in.gov/sos/elections/2006%20Municipal%20Registration%20and%20Turnout.pdf.

[19] Victor Joecks, *Façade of Enforcement*, Evergreen Freedom Foundation, April 21, 2006, *available at* http://www.effwa.org/enforcement.

[20] Brad Shannon, *Felon voter won't be charged*, THE OLYMPIAN, March 30, 2006.

One year after the election contest was over; twenty-five more complaints of double-voting were filed with election officials. Prosecutors investigated the complaints, but declined to prosecute. Not because the complaints were without merit, however. King County's (Seattle) prosecutor agreed that almost all of the complaints appeared to be instances of illegal double-voting, but explained that while "the integrity of the voter rolls is important, we must balance that with the myriad of public safety demands . . . We will continue to investigate blatant cases of voter fraud, while also exercising prosecutorial discretion. . . ."[21]

Prosecuting only "blatant" election crimes is not a preference limited to local law enforcement officials. United States Attorneys, who are responsible for prosecuting federal election crimes, also can and do choose to ignore individual instances of voter fraud. John McKay, former U.S. Attorney for Western Washington, chose not to prosecute any of the illegal votes in the 2004 election because, as he later told a reporter, "[I want] conclusive forensic evidence of a conspiracy. . . ."[22] With no evidence of a widespread conspiracy in Washington, he didn't prosecute anyone.

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[21] Letter from Dan Satterberg, Chief of Staff, Office of the Prosecuting Attorney, King County, to Jonathan Bechtle, Director, Voter Integrity Project, January 31, 2007.

[22] Stefan Sharkansky, *John McKay, In His Own Words,* SOUND POLITICS, May 21, 2007, *available at* http://www.soundpolitics.com/archives/008649.html.

And while the current version of the Department of Justice manual on election crimes would have disagreed with his decision, the version in place in 2004 cautioned against prosecuting individual voter fraud.[23]

A 2006 report on voter fraud commissioned by the U.S. Election Assistance Commission included a series of interviews with election experts who were asked about election crime prosecutions. The general consensus was, "voting fraud and voter intimidation are difficult to prove and require resources and time that many local law enforcement and prosecutorial agencies do not have. Federal law enforcement . . . have more time and resources but have limited jurisdiction and can only prosecute election crimes perpetrated in elections with a federal candidate on the ballot or perpetrated by a public official under the color of law."[24] So it's not surprising that the only election crime prosecutions in Indiana's recent history were for a large-scale conspiracy with many sordid details that was difficult to ignore. It also bolsters Judge Posner's contention that the lack of prosecutions for voter fraud in polling places should not be construed to mean there is no danger of fraud. *Crawford,* 472 F.3d at 953.

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[23] Paul Kiel, *New DOJ Manual Adopts Administration's Voter Fraud Focus*, TPM MUCKRAKER, July 27, 2007.

[24] Job Serebrov and Tova Wang, *Election Crimes: An Initial Review and Recommendations for Future Study,* U.S. ELECTION ASSISTANCE COMMISSION, December 2006, at 9.

3. The voter identification requirement in HAVA is inadequate because it is easily exploited.

Indiana was justified in determining that its polling place security measures of signature verification and criminal penalties were not adequate. Could the state, however, have satisfied its compelling interest in securing its elections by relying on the less-restrictive HAVA voter identification requirements? 42 U.S.C. § 15483(b). Those requirements allowed voters to use non-picture identification like a bank statement, a paycheck, or a utility bill that may be easier for voters to acquire than photo identification. *Id.* The experience of Washington again reveals why a state would be justified in exceeding HAVA's minimal standard.

In 2006, a grandmother living near Seattle named Jane Balogh grew concerned about the insecurity of Washington's election system. As a public demonstration of the problem, she registered her dog to vote. Under the HAVA requirements she had to send voter identification with the mailed-in registration form. *Id.* She did so with a utility bill that she forged to show her dog's name. This was Balogh's first offense, and she had no specialized training or experience in forging documents. But her dog's registration was accepted, and he was given the opportunity to vote in three elections before Balogh made her

action public.[25] Unlike photo identification, a utility bill or paycheck is too easy to forge to constitute an adequate security measure.

F. Voter fraud results in the dilution of legal ballots, a harm very difficult to remedy after the fact.

In *Reynolds v. Sims* the Court equated vote dilution with voter disenfranchisement: "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964).

The Court has continued to recite this theme, holding in one case "Not only can this right to vote not be denied outright, it cannot, consistently with Article I . . . be diluted by stuffing of the ballot box," and in another case, "the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted." *Westberry v. Sanders,* 376 U.S. 1, 17 (1964); *U.S. v. Saylor,* 322 U.S. 385, 388 (1944). See also *Purcell v. Gonzalez,* ___ U.S. ___, 127 S.Ct. 5 (2006).

The Petitioners greatly emphasized the importance of not burdening even one voter, but neglect the

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[25] Keith Ervin, *Woman registers dog to vote; prosecutors growl*, SEATTLE TIMES, June 22, 2007.

flip side.[26] It's equally important, if not more so, to prevent even one voter's legal ballot from being diluted by voter fraud. If a voter cannot comply with a pre-voting requirement like photo identification a state can supply an alternative, as Indiana has done with provisional and absentee ballots. But once an illegal ballot has been cast, voter secrecy laws make it nearly impossible to find and retract that ballot. In Washington state's 2004 election, for example, the judge presiding over the election contest could only determine how four of the 1,678 illegal ballots were cast, thus diluting the legal votes of 1,674 unsuspecting Washington residents. *Borders v. King County,* at 8.

The East Chicago mayoral race tainted by voter fraud is another example of how difficult it is to identify and remove illegal ballots once they are cast. As the trial court described it:

> Petitioner Pabey, his legal counsel, and amateur investigators faced a herculean task of locating and interviewing absentee voters, visiting multi-family dwellings and housing projects, gathering and combing through voluminous election documents, and analyzing, comparing, sifting and assembling the information necessary to present their case . . . In short, the time constraints that govern election contests, primarily designed to serve important interests and needs of election

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[26] Pet. at 33.

> officials and the public interest in finality, simply do not work well in those elections where misconduct is of the dimension and multi-faceted variety present here. *Pabey*, 816 N.E.2d at 1146.

While this was absentee ballot fraud, the difficulty would have been no less with poll ballots. In fact, it may have been worse, since Pabey would have had to rely on hearsay from poll workers instead of having absentee ballot request forms to use in tracking down illegal votes.

Because of the compelling importance of preventing vote dilution, and the near impossibility of reversing its effects, Indiana is justified in requiring a prevote security measure like photo identification to prevent illegal votes from being cast in the first place.

G. A state's interest in election integrity does not require it to address all types of voter fraud at the same time.

Appellants argue that Indiana's enactment of a photo identification law is not justifiable because it does not also address absentee voting.[27] States need not, however, apply reform equally at the same time.

In the 1955 case of *Williamson v. Lee Optical of Oklahoma*, this Court stated, "Evils in the same field may be of different dimensions and proportions,

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[27] Pet. at 52.

requiring different remedies . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seem most acute to the legislative mind." 348 U.S. 483, 489 (1955). In later cases the Court reaffirmed this view, holding that a "legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked," and "that a legislature need not 'strike at all evils at the same time.'" *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 808 (1969).

Indiana chose to enact a reform recommended by election experts[28] that would help secure the ballot type used by ninety percent of Indiana voters.[29]

II. INDIANA HAS A COMPELLING INTEREST IN ENSURING THAT VOTERS HAVE CONFIDENCE IN THE INTEGRITY OF THE ELECTORAL PROCESS.

Voter confidence is an essential component of our representative democracy. Not only are legitimate votes diluted when voter fraud is perpetrated, but voters' confidence in the electoral process suffers harm. This confidence, when shaken, is very difficult to restore.

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[28] *Building Confidence in U.S. Elections, supra* at 21.

[29] *2006 General Election Turnout and Registration, supra.*

Photo identification laws are a reasonable, nondiscriminatory method for verifying legitimate voters and detecting fraudulent efforts. Moreover, election security measures such as Indiana's voter identification law enhance the electorate's certainty that only legitimate ballots will be cast and counted.

While the State need only demonstrate an "important regulatory interest," *Anderson*, 460 U.S. at 788, the State has a compelling interest in preserving the integrity of its election process. See *Eu*, 489 U.S. at 231; *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). Moreover, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 127 S.Ct. at 7.

A. Voter confidence is a fundamental component of ensuring democratic participation.

The right of citizens to select their representatives is one of the bedrocks of our democracy. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17.

This Court has long recognized the importance of an electorate confident in the integrity of its election systems. "Preserving the integrity of the electoral process, preventing corruption, and sustain[ing] the

active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important." *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 789 (1978) (internal quotes omitted).

Likewise, in *FEC v. National Right to Work Committee*, this Court recognized the dual governmental interests in "preventing both actual corruption and the appearance of corruption," 459 U.S. at 210.

A body of nationally-recognized election experts recently discussed the importance of preserving and building confidence in elections. The Commission on Federal Election Reform, co-chaired by former U.S. President Jimmy Carter and former U.S. Secretary of State James A. Baker, III, issued a detailed report on election reform efforts, titled "Building Confidence in U.S. Elections."[30]

The report identified a confident electorate as one of the keystones of a functional democracy. "Building confidence in U.S. elections is central to our nation's democracy." *Id.* at iv. The report included 87 recommendations to improve public confidence,

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[30] Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, September 19, 2005, *available at* http://www.american.edu/ia/cfer.

including a recommendation for photo identification to verify voters at polling places.

B. Voter fraud lowers public confidence in the election process.

1. Voter fraud is a serious problem in U.S. elections.

As discussed above in Section I.B, voter fraud is a problem that numerous states are grappling with in order to secure the electoral process. Additionally, the District Court below recognized numerous examples of in-person voter fraud in several states. *Indiana Democratic Party*, 458 F.Supp.2d at 793-94.

The Carter-Baker Commission on election reform acknowledged the reality of voter fraud, stating: "***there is no doubt that it occurs***." Carter-Baker Report at 18 (emphasis added). The Commission referenced several examples from the November 2004 elections. Investigators in Milwaukee, Wisconsin, found evidence of fraud, including more than 200 felons voting illegally and more than 100 people who voted twice, used fake names or addresses, or voted in the name of a dead person. This investigation revealed there were 4,500 more votes cast than voters listed. The Commission cited an estimate that over 181,000 dead people were listed on voter rolls in six swing states in the November 2004 elections. *Id.* at 4.

Since October 2002 the U.S. Department of Justice has launched more than 180 investigations into election fraud, resulting in charges for multiple

voting and providing false information on felon status. Three Kansas residents were convicted of voting in both Kansas and Missouri in the 2002 and 2000 elections. In the Milwaukee, Wisconsin investigation, four individuals were charged with multiple voting, and six people were charged with providing false information regarding their felon status, in the 2004 general elections. In Florida, 14 non-citizens, including a candidate for the state legislature, pleaded guilty or were convicted at trial of voting-related offenses.[31]

The problem of voter fraud is also judicially recognized. See *Evans v. City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993) ("Electoral fraud has been a persistent blemish on the political system of Chicago."); *Ortiz v. City of Philadelphia Office of City Com'rs Voter Registration Div.*, 28 F.3d 306, 318 (3rd Cir. 1994) (Scirica, J., concurring) ("Voter fraud, including the practice of voting dead or non-resident citizens, is no stranger to Pennsylvania. . . ."); *Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004) (" . . . especially in a state as notorious for election fraud as Illinois. . . ."); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections. . . .").

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[31] U.S. Department of Justice press release, *Department of Justice To Hold Ballot Access and Voting Integrity Symposium*, August 2, 2005.

Even a cursory review of recent headlines demonstrates the existence of voter fraud. An investigative reporter in Pittsburgh discovered 9,000 deceased voters still registered, with 16 of them voting in recent elections. Rick Earle, *Ghost Voters Cast Ballots In Pittsburgh Elections*, WPXI, November 1, 2007. A husband and wife in California pleaded no contest to a misdemeanor charge of fraudulently voting in an election they were not legally registered. Walter Yost, *Couple sentenced for voter fraud in bond election*, SACRAMENTO BEE, November 5, 2007. Two county elections workers in Ohio were convicted for rigging a ballot recount during the hotly contested 2004 presidential election. Jim Nichols, *Ohio: Election Workers Convicted*, NEW YORK TIMES, January 25, 2007. In an attempt to prove the "system is flawed," a Washington woman registered her dog to vote. Neil Modie, *Canine removed from voter rolls*, SEATTLE POST-INTELLIGENCER, July 11, 2007. A circuit judge in Mississippi found voter irregularities including a vote cast for a dead man and a vote by a man who was in the hospital on election day. Editorial, *Voter fraud in Jeff Davis demands reform*, HATTIESBURG AMERICAN, October 27, 2007. A campaign worker in St. Louis submitted bogus signatures – including those belonging to dead voters – in an unsuccessful attempt to force a recall vote. Jake Wagman, *Campaign worker plead guilty to fraud*, ST. LOUIS DISPATCH, November 8, 2007. An investigation by Mississippi officials revealed that votes were cast for at least three dead people in a recent election. Residents of a single nursing home were registered in six different

precincts. At least three convicted felons and one incarcerated individual were allowed to cast votes. Two votes were also cast by persons not registered as U.S. citizens. Peter Thomas, *Judge calls for special election*, THE TUNICA TIMES, November 5, 2007.

The result of these news stories is an "appearance of corruption stemming from the public awareness of the opportunities for abuse," *Buckley v. Valeo*, 424 U.S. 1, 27 (1976), and debunks Petitioners' claim that Indiana "stoked" public fears with a "propaganda" campaign.[32] A single fraudulent vote can be reported by news media to thousands of honest voters and can shake public confidence if adequate measures are not taken to preserve the integrity of the election process.

2. Voter fraud and the appearance of fraud harm the public confidence in election integrity.

Voter fraud – whether real or perceived, widespread or isolated – has a debilitating effect on lawful participation. The primary concern with voter fraud is that it effectively cancels out legitimate voters. *Reynolds*, 377 U.S. at 555. The results of close elections can be thrown by just a few illegitimate votes.

Moreover, this Court has recognized that the eroding of public confidence through the *appearance*

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[32] Pet. at 55.

of corruption directly implicates the "integrity of our electoral process." *FEC v. National Right to Work Committee*, 459 U.S. at 208 (quoting *United States v. UAW*, 352 U.S. 567, 570 (1957)).

The mere appearance of wrongdoing can negatively impact public confidence, as this Court wrote when upholding the provisions of the Hatch Act. "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

When voter fraud is discovered, it is often widely reported in news reports and discussed by legislative bodies. Conscientious voters who pride themselves on civil involvement are unlikely to overlook this problem. "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S.Ct. at 7.

Citizen participation is crucial to our form of representative democracy. The Carter-Baker Commission acknowledged the devastation that could occur if honest voters doubt the legitimacy of elections and decline to participate. "Democracy is endangered when people believe that their votes do not matter or are not counted correctly." Carter-Baker

Report at 1. "Little can undermine democracy more than a widespread belief among the people that elections are neither fair nor legitimate." *Id.*

Numerous studies, surveys and polls demonstrate the price electoral fraud (or its appearance) exacts from the voting public.

A 2004 Rasmussen Reports survey showed that 58 percent of American voters were worried another Florida-style mess could mar the 2004 election (including 29 percent who are "very worried" about such a possibility).[33]

The Pew Research Center asked November 2004 voters about their confidence that votes across the country were accurately counted. A minority of voters were "very confident" (48 percent), while 51 percent expressed some doubt (37 percent "somewhat confident," 7 percent "not too confident," and 7 "not at all confident").[34] The Pew Center asked a similar question two years later, just before the November 2006 elections. Only 27 percent of those surveyed were "very confident" votes would be accurately counted, and 69 percent expressed doubt (37 percent

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[33] Rasmussen Reports, *58% Worried About 2004 Voting Debacle*, October 19, 2004, *available at* http://www.rasmussenreports.com/public_content/politics/election_2004/58_worried_about_2004_voting_debacle.

[34] Pew Research Center for the People & the Press, *Voters Liked Campaign 2004, But Too Much 'Mud-Slinging,'* November 11, 2004, *available at* http://people-press.org/reports/display.php3?ReportID=233.

"somewhat confident," 17 percent "not too confident," 15 percent "not at all confident").[35]

A 2006 study examining the attitudes of the American public concerning elections found there was a decline in confidence among voters from 2005 to 2006 that their vote in 2004 was counted accurately. The authors of the study attributed the decline to a prospective concern that votes in 2006 might not be counted accurately.[36]

Washington state's 2004 gubernatorial election opened the state's election processes to scrutiny by election officials, journalists, and citizen investigators, as discussed above in Section I.B. After the election, registered voters in Washington were surveyed by a public affairs agency and asked, "Do you have more confidence, less confidence, or about the same amount of confidence in the election process as a result of the gubernatorial controversy?" In May 2005 only 26 percent reported more or the same amount of confidence in the election process, while a majority – 61 percent – reported "less confidence."[37]

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[35] Pew Research Center for the People & the Press, *Who Votes, Who Doesn't and Why*, October 18, 2006, *available at* http://people-press.org/reports/display.php3?ReportID=292.

[36] R. Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *American Confidence in Electronic Voting and Ballot Counting: a Pre-Election Update*, November 3, 2006, *available at* http://vote.caltech.edu/reports/2006-Voter-Confidence-Survey.pdf.

[37] Strategic Vision, *Poll Results – WA*, May 2005, *available at* http://www.strategicvision.biz/political/washington_poll_0520.htm.

This low confidence level persisted nearly two years after the 2004 election, demonstrating the difficulty of overcoming voter distrust after fraud or inept election management are discovered. Washington voters were asked: "Are you confident that Washington has overcome the problems that hindered the 2004 Election and that there will be no problems with the 2006 Election?" Voters overwhelmingly indicated low confidence: in August 2005 (73 percent "no" and 17 percent "yes"), in February 2006 (71 percent "no" and 16 percent "yes"), and in September 2006 (70 percent "no" and 14 percent "yes").[38]

These results suggest it is good public policy to adopt security measures *before* voter fraud scandals erupt, as this Court has recognized. See Section I.C *supra*. Delaying legislative action until after fraud is perpetrated may result in damage not easily repaired.

C. Indiana's interest in voter confidence is advanced by the photo identification law.

Indiana's photo identification law is a reasonable method for verifying legitimate voters. States inevitably

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[38] Strategic Vision, *Poll Results – WA*, August 2005, *available at* http://soundpolitics.com/SV_WAAugust.pdf; Strategic Vision, *Poll Results – WA*, Feb. 2006, *available at* http://www.strategicvision.biz/political/washington_poll_021506.htm; Strategic Vision, *Poll Results – WA*, Sep. 2006, *available at* http://www.strategicvision.biz/political/washington_poll_092806.htm.

must adopt regulations to secure the ballot, and photo identification laws ensure that ballots are cast by legitimate voters. Election security measure such as Indiana's photo identification law tend to enhance public confidence in ballot integrity.

1. The state may verify voter identifications to secure the ballot.

States are given wide latitude to regulate the order and security of the election process. See *Smiley*, 285 U.S. at 366 (states may "provide a complete code for . . . prevention of fraud and corrupt practices . . . "); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.")

Every election provision "inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. "Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.*

It is essential for secure elections that each voter cast only one ballot, and that only legitimate voters

vote. One reasonable means to accomplish this is to require the production of photo identification.

2. National election experts recommend photo identification.

The Carter-Baker Commission on Federal Election Reform recognized the potential for voter fraud, and the bi-partisan Commission recommended that states require voters to use photo identification "[t]o ensure that persons presenting themselves at the polling place are the ones on the registration list," Carter-Baker Report at 21.

The Commission rejected the argument that photo identification should be completely abandoned. "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* at 18. Addressing the concern that photo identification may present a barrier to voting, the Commission recommended that government-issued photo identification be made available without expense and that states proactively assist individuals in registering to vote and obtaining identification.

The Commission also discussed one of the positive consequences of a photo identification requirement: voter confidence. "A good ID system could deter, detect, or eliminate several potential avenues of fraud – such as multiple voting or voting by individuals using the identities of others or those who are deceased – and thus it can enhance confidence." *Id.*

3. Photo identification laws enhance voter confidence.

Not only do photo identification laws help deter and detect fraudulent votes, the measures tend to enhance voter confidence. Numerous studies and polls indicate support among voters for measures that improve election security, including photo identification laws.

A 2006 survey conducted for the Wall Street Journal and NBC News asked whether voters should be required to show valid photo identification when they vote. Eighty-one percent of those surveyed supported the requirement, seven percent opposed it, and twelve percent were neutral.[39]

Gauging public sentiment about election security after the 2004 Washington gubernatorial election, the Evergreen Freedom Foundation commissioned a statewide survey of registered voters. Participants were asked whether they agreed with the statement: "Any person desiring to vote in person at a polling station in any election must present valid photo identification prior to signing the poll book." Eighty-seven percent of participants supported the statement (66

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[39] NBC/WSJ Study #6062, April 2006, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/060424_NBC-WSJ_Poll.pdf.

percent "strongly support" and 21 percent "somewhat support") with only 12 percent opposing.[40]

A joint study of voters in Colorado and New Mexico found that voters see a positive link between photo identification laws and election security.[41] Voters in Colorado were asked several questions about voter identification rules. Nearly three-quarters (74.5 percent) of registered voters thought voter identification rules help prevent voter fraud (13.8 percent disagree). A majority of voters acknowledged this link regardless of their party affiliation (Democrat, Independent, Republican).[42]

Voters were then asked a polarizing question about the voter identification debate, "Some people argue that voter identification rules prevent some voters from going to the polls, while others argue that voter identification rules prevent voting fraud. Which is more important? Ensuring that everyone who is eligible has the right to vote or protecting the voting

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[40] Dresner, Wickers & Associates, *Washington Statewide Survey*, January 30, 2006, *available at* http://www.effwa.org/files/pdf/Washington_Statewide_Survey.pdf.

[41] Lonna Rae Atkeson, *The 2006 Colorado Seventh Congressional District Registered Voter Election Administration Report*, August 2007, *available at* http://vote2006.unm.edu/COsummary.htm; R. Michael Alvarez, Lonna Rae Atkeson & Thad E. Hall, *The New Mexico Election Administration Report: The 2006 November General Election*, August 2, 2007, *available at* http://vote2006.unm.edu/NM_Election_Report.pdf. The authors of the studies submitted an *amicus curiae* brief in support of Petitioners.

[42] Atkeson at 8.

system against voter fraud?" Half of those interviewed (50.4 percent) supported voter identification in order to protect the system against fraud; 40.4 percent thought it was more important to ensure everyone who is eligible has the right to vote. *Id.* at Table 13.

Voters in New Mexico were asked the same questions, and 7 in 10 registered voters (69.9 percent) believe voter identification laws help prevent voter fraud (16.7 percent disagree), with strong majorities across political party lines.[43] Asked whether election security or access to the polls is more important, over half (52.2 percent) of the New Mexico participants supported voter identification, while 41.4 percent thought it was more important to ensure everyone who is eligible has the right to vote. *Id.* at 60.

III. OTHER STATES ARE CONSIDERING PHOTO IDENTIFICATION AS A USEFUL ELECTION SECURITY MEASURE.

Petitioners indicate Indiana's photo identification law "departs from usual and customary regulations adopted elsewhere,"[44] but in reality Indiana is one among many states in the process of upgrading election security requirements. A quick perusal of voter-verification laws and recent legislation in other states reveals the commonality of Indiana's law.

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[43] Alvarez at 59.

[44] Pet. at 29.

A. States that require voters to show photo identification.

In addition to Indiana, Georgia and Florida require voters to show photo identification. Florida requires in-person voters to provide a current and valid picture identification with a signature. Fla. Stat. § 101.043.

After a lengthy legal battle, Georgia now requires voters to show photo identification when voting in person. Ga. Code Ann. § 21-2-417 (upheld by *Common Cause/Georgia v. Billups*, 504 F.Supp.2d 1333 (N.D. Ga. 2007).

B. States that request voters to show photo identification.

Other states request in-person voters to show photo identification. Those without the proper ID may complete an affidavit in lieu of identification and cast a ballot.

Hawaii requires voters to provide identification if so requested by a precinct official. Haw. Rev. Stat. § 11-136. Louisiana requires voters to present a Louisiana driver's license, a Louisiana special identification card or other generally recognized picture identification card that contains the person's name, address, and signature. La. Rev. Stat. Ann. § 18:562.

Michigan requires voters to present an official state identification card or other generally recognized picture identification card before receiving a ballot.

Mich. Comp. Laws § 168.523. The state's photo identification requirement was upheld as constitutional in an advisory opinion by the Supreme Court of Michigan. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007). The law, passed in 1996, was not enforced by the Secretary of State after an Attorney General opinion questioned the constitutionality. *Id.* at 448. Subsequent national attention on the issue of voter fraud prompted the Michigan House of Representatives to request an advisory opinion of the state Supreme Court regarding whether the photo identification requirements violated either the Michigan Constitution or the United States Constitution. The court held that it did not. "The identification requirement is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections. . . ." *Id.*

In South Dakota, all voters are required to provide identification before voting or obtaining an absentee ballot. S.D. Codified Laws § 12-18-6.1. Acceptable forms of photo identification include a South Dakota driver's license or nondriver identification card, a passport or identification card issued by an agency of the United States government, a tribal identification card, a current student identification card issued by a high school or institution of higher education located within the state.

C. Congress and many states have considered photo identification requirements.

In addition to the above states that require or request photo identification for voting, numerous state legislatures and Congress have considered legislation that would require a voter to present photo identification to vote.

In 2006 the House of Representatives passed the Federal Election Integrity Act, requiring each individual who desires to vote in an election for Federal office to provide the appropriate election official with a government-issued photo identification. The bill was enacted in the House but died in the Senate. Federal Election Integrity Act, H.R. 4844, 109th Congress (2006).

Several states have passed photo identification requirements in one or more legislative branches. The Kansas Senate passed a bill requiring voters under age 65 to show photo identification to cast a ballot. S.B. 169, 2007 Reg. Sess. (Kan. 2007). The Minnesota House of Representatives passed a bill requiring voters to show a "picture identification card or document" before voting. H.F. 1443, 84th Leg. Sess. (Minn. 2006). The Mississippi Senate enacted a bill requiring voters to present a photo or government-issued ID. S.B. 2617, 2007 Reg. Sess. (Miss. 2007). The Wisconsin Legislature twice passed a bill requiring photo identification for in-person voting, both of which Wisconsin Governor Jim Doyle vetoed. A.B. 111, 2003

Reg. Sess. (Wi. 2003); S.B. 42, 2005 Reg. Sess. (Wi. 2005).

Other state legislatures that have recently considered photo identification proposals include: Alabama, Arkansas, California, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, and Washington.[45]

Indiana is certainly not alone in promulgating reasonable, nondiscriminatory regulations to prevent voter fraud.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[45] See National Conference of State Legislatures, Election Reform Legislation, at http://www.ncsl.org/programs/legismgt/elect/elections.cfm.

AMICUS CURIAE BRIEF

Nos. 07-21 and 07-25

In the Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF
UNITED STATES SENATOR DIANNE FEINSTEIN,
UNITED STATES REPRESENTATIVE ROBERT A. BRADY,
AND UNITED STATES REPRESENTATIVE ZOE LOFGREN
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS
[Federal Preemption]

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INTEREST OF THE AMICI[1]

Indiana's requirement that all voters present government-issued photo identification before casting an official ballot in federal elections is inconsistent with mandatory voter identification requirements enacted in the Help America Vote Act of 2002. Amici are current Members of Congress who have significant interests in the resolution of this issue.

United States Senator Dianne Feinstein is the senior United States Senator from the state of California. She also is the current Chair of the Senate Rules and Administration Committee, which is the committee of jurisdiction for proposed legislation related to federal elections. As a member of the Rules and Administration Committee in the 107th Congress, she participated in the bipartisan negotiations and debates on the Help America Vote Act of 2002. Senator Feinstein has a strong and continued interest in ensuring the fair and equitable administration of federal elections.

United States Representative Robert A. Brady represents the First District of Pennsylvania and is the current Chair of the Committee on House Administration. The Committee on House Ad-

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, no counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ministration is the committee of the United States House of Representatives responsible for considering proposed legislation related to federal elections. The Committee was instrumental to the passage of the Help America Vote Act of 2002. Representative Brady is committed to strengthening the integrity of the federal election process and protecting the right to vote.

United States Representative Zoe Lofgren represents the Sixteenth District of California and is the current Chair of the Subcommittee on Elections. A division of the Committee on House Administration, the Subcommittee on Elections has direct jurisdiction over all proposed legislation related to federal elections. Representative Lofgren believes strongly in the importance of strengthening the fairness, accessibility, and integrity of federal elections.

SUMMARY OF THE ARGUMENT

Although the parties in this case address the constitutional question presented by Indiana's photo identification requirement, the issue of federal preemption, while not argued below, may be considered separate and apart from the equal protection claim and is "ultimately dispositive of the present dispute." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).[2] The Help America Vote Act of

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[2] For the Court to resolve a question based on an issue or argument not raised below is not without precedent. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing question raised only in *amicus* brief. Court stated that its

2002 ("HAVA") requires a narrowly defined class of voters to present either photo identification or one of several alternative forms of identification before casting a ballot in federal elections. *See* 42 U.S.C. §§ 15301-15545 (2006). The requirement is mandatory – states may neither add to the requirement nor subtract from it. Yet pursuant to a state law adopted in 2005, Indiana requires *all* voters to present valid government-issued photo identification before casting a ballot in federal elections, and requires certain first-time voters to present more than one form of identification. To the extent that Indiana enforces its photo identification requirement in federal elections, the requirement is contrary to federal law. *Amici* urge the Court to find that with respect to voters in federal elections, the limited identification requirement in HAVA preempts the Indiana photo identification requirement. The judgment below should be reversed.[3]

"*sua sponte* consideration of retroactivity is far from novel"); *McCleskey* v. *Zant*, 499 U.S. 467, 522-23 (1991) (Marshall, J., dissenting) (stating that majority opinion relied on argument raised by *amicus*, but not in the courts below); *see also Gilmer* v. *Interstate/Johnson-Lane Corp.*, 500 U.S. 20, 36-37 (1991) (Stevens, J., dissenting) (stating that Court should have addressed argument raised for the first time by amici); *Arcadia*, 498 U.S. at 77 (deciding case based on issue not raised below or in any of the briefs before the Court).

[3] Although *amici* suggest that the Court resolve the question on the basis of federal preemption without reaching the constitutional question presented, nothing in this brief is intended to imply that Indiana's photo identification requirement does not violate the First and Fourteenth Amendments to the United States Constitution

Article 1, section 4 of the United States Constitution invests Congress with the authority to make or alter regulations governing the time, place and manner of federal elections. In *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932), this Court affirmed Congress's broad authority to regulate and supervise federal elections, and recognized Congress's ability to substitute its judgment for the judgment of a state in matters relating to the administration of federal elections. *See also Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) ("Although the United States Constitution, and Supreme Court decisions interpreting the Constitution, give primary responsibility for administering and regulating elections to the States, the States must adhere to certain constitutional and statutory requirements."). Congress exercised its constitutional authority when it enacted HAVA's voter identification requirement 42 U.S.C. § 15483(b) ; *see also* Remarks by the President at Signing of H.R. 3295, Help America Vote Act of 2002, October 29, 2002 ("The administration of elections is primarily a state and local responsibility. The fairness of all elections, however, is a national priority."). The federal law requires a small class of voters, those who register by mail and have not previously voted in the state, to present identification before casting a regular ballot in a federal election. *See* 42 U.S.C. § 15483(b). Aware that a strict photo identification requirement would disenfranchise some eligible voters, Congress specified a list of acceptable alternative forms of identification. *See id.* Congress also deliberately limited application of

the identification requirement to first-time voters who registered by mail. *See id.*

Substituting its own judgment for that of Congress, Indiana has imposed an identification requirement that is inconsistent with the requirement in HAVA. *See* IND. CODE § 3-5-2-40.5 (2007); § 3-11-8-25.1 . It requires all voters to present a very specific form of photo identification before casting an official ballot in federal elections. The command of Congress, however, is clear – in the context of federal elections, only first-time voters who registered by mail may be required to present identification. Congress further requires that such voters be given a choice of presenting either photo identification or one of several alternative documents. Given the federal mandate, a state may no more require all voters to present identification than it may permit first-time voters who registered by mail to present no identification. It may no more limit the federally permissible forms of identification required than it may allow first-time voters who registered by mail to provide only a signature. Federal law precludes a state from altering the requirement either by adding to it or subtracting from it.

HAVA was a carefully balanced, bipartisan effort to improve the conduct of our national elections. As such, it required compromises between Members, including *amici*, who were concerned that too many eligible voters were regularly denied their right to vote because of irregularities in the administration of federal elections and other Mem-

bers who shared that concern but sincerely felt that additional measures were necessary to protect against voter fraud. HAVA's voter identification requirement reflects the delicate balance that Congress achieved after weighing the merits of both concerns. The Indiana law that is now before this Court upsets that balance.

It is inconceivable to *amici* that Congress would have gone to the lengths that it did to narrowly define the class of voters subject to the requirement, and to specify the types of identification that may be required of a voter, if it did not intend states to adhere to the law as written. While *amici* did not believe that an identification requirement was necessary, they supported the legislation because it allowed voters to present alternatives to photo identification and was limited to first-time voters who registered by mail. Indiana has nullified these alternatives, and even goes so far as to require first-time voters who registered by mail to meet two separate identification requirements. *See* § 3-7-33-4.5(a) ; § 3-11-8-25.2(b) . Rather than protecting a citizen's right to vote, Indiana has used the federal requirement from HAVA to create an additional impediment to voting.

It should not be forgotten that Congress passed HAVA in response to egregious aspects of the administration of elections in this country that were exposed in the wake of the 2000 presidential elections. First and foremost, the goal was to protect the franchise – to make it easier, not harder, for every eligible citizen to vote, and to have his or her

vote counted. *See* H.R. REP. NO. 107-329(I), at 38 (2001) ("Studies of the nation's election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters."). Congress recognized that certain measures designed to protect against fraud may have the unwelcome effect of denying eligible voters their right to vote.

This concern is evident in the care that Congress took in crafting HAVA's identification requirement. Congress would not have expended the effort and *amici* would not have supported the bill if states could freely ignore its requirements. HAVA requirements are not hortatory, nor were they intended merely as a set of good practices. They are national requirements for the conduct of federal elections to which states must conform – purposefully designed to assure that no eligible citizen loses his opportunity to vote because of an unduly restrictive state regulation.

The Indiana identification requirements, far more extensive than the limited requirement permitted in HAVA, "stand as an obstacle" to the execution of federal purpose and intent. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Although HAVA does not preclude a state from establishing its own election administration and technology requirements, the state requirements must not be "inconsistent" with the requirements established under HAVA. *See* 42 U.S.C. § 15484 . The provi-

sions of the Indiana statute at issue in this case are inconsistent with the federal requirement. Indiana law precludes voters from presenting the alternate forms of identification that HAVA deems to be sufficient for voting in federal elections, and requires all voters to present identification rather than limiting the requirement to first-time voters who registered by mail. Accordingly, the Court should find that federal law preempts Indiana's photo identification requirement.

ARGUMENT

FEDERAL VOTER IDENTIFICATION REQUIREMENT IN HELP AMERICA VOTE ACT OF 2002 PREEMPTS INDIANA STATE LAW

A. Help America Vote Act of 2002 Asserted Congressional Authority in Administration of Federal Elections and Imposed Mandatory State Requirements.

In 2001, Congress resolved to address numerous inadequacies and irregularities in the administration of federal elections that had come to light in the wake of the 2000 presidential election. Among the problems that motivated Congress to act were "inadequate voter education; confusing ballots; outdated and unreliable voting machines; poll workers who were unable to assist voters who needed assistance because they were overwhelmed or undertrained, or both; and registered voters who were wrongly denied the right to vote." 148 CONG. REC. S2527 (2002) (statement of Sen. Daschle). Members of Congress, including *amici*,

emphasized the need for national standards in the administration of federal elections. *See* Election Reform: Hearings Before the Senate Committee on Rules and Administration, 107th Cong., 1st Sess., 132 (2001) (statement of Sen. Feinstein) ("I would be very supportive of legislation which would require States to meet uniform and nondiscriminatory standards in technology and administration."). After months of congressional debate and bipartisan negotiation, the enactment of the Help America Vote Act of 2002 asserted "the authority, and responsibility, of Congress to regulate the administration of Federal elections, both in terms of assuring that voting systems and procedures are uniform and nondiscriminatory for all Americans and in ensuring the integrity of federal election results." *Id.* at S2528 (statement of Sen. Dodd); *see also id.* at S2527 (statement of Sen. Daschle) ("Our system leaves it to States to decide the mechanics of election procedures. But the right to vote is not a State right. It is a constitutional guarantee. And it is up to us to see that it is protected."). Overwhelmingly adopted by the House and the Senate, the bill was signed by President George W. Bush on October 29, 2002.

HAVA established "federal requirements for the conduct of Federal elections to ensure that the most fundamental of rights in a democracy – the right to vote and have that vote counted – is secure." *Id.* at S2528-29 (statement of Sen. Dodd); *see also id.* at S2527 (statement of Sen. Daschle) ("By working together, our colleagues have produced legislation that will protect the most basic of

all American rights: the right to vote, and to have that vote counted."). The standards were mandatory. Congress specifically drafted the legislation so that states would not be "allowed to opt out of the recommended changes in Federal elections." *Id.* at S2532 (statement of Sen. Dodd). On the contrary, "minimum Federal requirements would ensure that every eligible voter can cast a vote and have that vote counted." *Id.* (statement of Sen. Dodd).

HAVA was the product of months of bipartisan debate and negotiation. Members of Congress – Democrats and Republicans – took ownership of their obligation to "make it easier to vote and harder to cheat," and fully expected that the compromise they reached would govern the administration of federal elections across the country. *Id.* at S718 (statement of Sen. Bond); *see, e.g., id.* (statement of Sen. Bond) ("Every American citizen—appropriate age, appropriate qualifications, properly registered—ought to be able to cast a ballot without difficulty. They also ought to be able to do that only once."); *id.* at S710 (statement of Sen. Dodd) ("All of us worked many months to develop legislation that would try to meet one central goal: that was to make it easier to vote in America and much harder to corrupt our Federal election system."); *id.* at S2527 (statement of Sen. McCain) ("The compromise ... included provisions that would both include mandatory Federal standards to make the election process easier for legitimate voters and prevent voter fraud."). Determined to ensure greater uniformity and accountability in

federal elections, Congress imposed mandatory requirements carefully tailored for that purpose. The Act specifically required states to be in compliance with the requirements by a certain date, and allowed state requirements to deviate from the federal requirements only to the extent that they remained consistent with federal law. *See* 42 U.S.C. § 15484.

B. Congressional Compromise Limited Applicability of Voter Identification Requirement and Provided Expansive List of Permissible Forms of Identification.

HAVA's narrowly constructed voter identification requirement reflects the spirit of compromise present throughout the Act. *See* 148 CONG. REC. S712 (2002) (statement of Sen. McConnell) ("[T]he Dodd-McConnell bill is a comprehensive compromise."); *id.* at S1224 (statement of Sen. Bond) (identification requirement represented "key anti-fraud provision that was carefully negotiated over 6 months as part of a bipartisan compromise"). In the limited case of individuals who registered to vote by mail and have not previously voted in a federal election in the state (or jurisdiction if the state does not have a computerized registration list), HAVA requires such individuals to present either a "current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" before casting an official ballot in federal elections. 42 U.S.C. § 15483(b)(2)(A)(i). The re-

quirement does not apply to individuals who submit as part of their registration a copy of the aforementioned identification; nor does it apply to individuals who submit with their registration either the last four digits of their social security number or their drivers' license number, and such number is "matched" with information already on file with the state election board. *See* 42 U.S.C. § 15483(b)(3).

The original version of the federal voter identification requirement appeared in the manager's amendment to the Equal Protection of Voting Rights Act of 2001, an election reform bill reported out of the Senate Committee on Rules and Administration on November 28, 2001. *See* S.A. 2688, 102d Cong. § 103(b) (2001); 147 CONG. REC. S13766 (2001) ; *see also* S.565, 102d Cong. (2001). Senator Chris Dodd, Democrat of Connecticut and chair of the Senate Committee on Rules and Administration, introduced the amendment on behalf of himself and Senators McConnell, Schumer, Bond, Torricelli, McCain, and Durbin. Senators on both sides of the aisle hailed the proposed compromise as a bipartisan achievement. The House version of the election reform bill, introduced and referred to the Committee on House Administration on November 14, 2001, did not include any version of the identification requirement until the Senate provision was incorporated in the conference committee process late in 2002. *See* H.R. 3295, 102d Cong. (2001).

When the Senate formally considered the election reform bill in February and March of 2002, Democrats and Republicans emphasized the work that they had done to balance the goals of protecting the right to vote and preventing voter fraud. Central to the debate was the compromise Senators had reached on requiring certain first-time voters to present identification before casting a ballot. Even Senator Bond, widely acclaimed on a bipartisan basis for taking the lead on anti-fraud provisions throughout the bill, emphasized the commitment he had to "taking every precaution to protect the rights of legal voters." 148 CONG. REC. S720 (2002) (statement of Sen. Bond). He and others believed that the identification requirement succeeded only if it were applied in concert with provisions designed to make it easier for voters to vote. *See id.* (statement of Sen. Bond) ("I told [Sen. Dodd] that election reform without protections against vote fraud could not earn my support. He listened, and we talked a great deal and agreed on a formula that we believed could attract bipartisan support.... We worked closely together for several months to close loopholes while taking every precaution to protect the rights of legal voters. That is what I think we have done."); *id.* at S710 (statement of Sen. Dodd) ("All of us worked many months to develop legislation that would try to meet one central goal: that was to make it easier to vote in America and much harder to corrupt our Federal election system.").

Democrats tested the strength of the bipartisan compromise by introducing an amendment to the

identification requirement that would have allowed voters to use their signature as a form of identification. Although the amendment was eventually withdrawn in favor of the existing compromise, the prolonged debate allowed Senators the opportunity to emphasize the intended scope and limitations of the identification requirement. Proponents of the existing federal identification requirement asserted that the provision's limited applicability was intentional: "There has been a lot of misinformation about this anti-fraud provision. It applies only to a small number of voters who register by mail and vote for the first time. As Senator Bond made clear, this is the prime area of voter fraud." *Id.* at S1226-27 (statement of Sen. McConnell); *see also id.* at S2473 (statement of Sen. Bond) ("The proof of identity requirement only applies one time – the first time – to those who choose to register by mail."). Furthermore, by limiting the requirement's applicability to voters who had moved from out of state (rather than voters who had moved from one jurisdiction to another within the same state), the intended consequence was that "many fewer people [would] trigger the photo identification requirement." *Id.* at S2474-75 (statement of Sen. Schumer). Senators concluded that to apply the requirement more broadly would upset the balance between protecting the right to vote and preventing voter fraud. A more stringent identification requirement would be an undue burden on the franchise and any additional prevention of voter fraud would be minimal. The evidence presented in this case supports

the conclusion relied upon by Congress in enacting the more limited requirement.

Recognizing that many eligible voters may not have photo identification, Senators highlighted the range of permissible forms of identification that first-time voters who registered by mail would be allowed to present: "Mail registrants who vote for the first time now have many options to identify themselves. Photo ID is only one of them. A current utility bill, bank statement, government check, paycheck or any other government document would serve the purpose." *Id.* at S1227 (statement of Sen. McConnell); *id.* at S1229 (statement of Sen. Bond) ("As part of the compromise we reached over 6 months, we said one does not have to show up with a photo ID with their address on it the first time they vote after they have registered by mail, we will let them bring in or send in either a photo ID or any of a number of documents which would tend to show that they are a real person, such as a utility bill, a government check, a paycheck, bank statements."). Because "everybody does not have photo identification," Congress found it necessary to create "an expansive list of alternatives." *Id.* at S2473 (statement of Sen. Bond).

Specifically rejecting the option of requiring photo identification, Senators made a deliberate decision to permit first-time voters who register by mail to present any one of a number of different forms of identification. *See id.*; *see also id.* at S1383 (statement of Sen. Specter) ("[T]he fact of

the matter is, the underlying bill which was worked out in the compromise does not require photo identification. Photo identification is one way. There could be a bank statement, a utility bill, a paycheck, a government check or any other government document showing an address, showing a person is in existence. If the underlying bill required a photo identification, I would say that is too difficult. There are many other ways to establish that the person actually is in existence...."); *see also id.* at S1416 (statement of Sen. Specter). The benefits of making it easier for first-time voters to vote by allowing greater flexibility in the identification requirement outweighed any perceived benefits of preventing potential voter fraud by requiring such voters to present a specific form of photo identification. The language of HAVA's identification requirement was deliberate; Congress did not intend that voters would be required to present a specific form of photo identification any more than it intended that voters would be required to present no form of identification whatsoever. Instead, voters were to be given a very specific, and extensive, list of acceptable forms of identification. Presenting any one of the alternate forms of identification would serve to prevent fraud without disenfranchising voters who lack a current photo identification card. HAVA's identification requirement would be meaningless if a state could allow a first-time voter who registered by mail to vote without identification; it would be equally meaningless if a state could deny such voter the right to vote unless she produced a government-issued photo identification card.

C. Indiana Voter Identification Requirement Improperly Extends Applicability of Federal Identification Requirement and Narrows List of Permissible Forms of Identification.

In contrast to HAVA's limited identification requirement, the photo identification requirement imposed by Indiana Senate Enrolled Act 483 (enacted in 2005) requires all voters wishing to vote an official ballot to present a photo identification issued by the United States or the state of Indiana. *See* IND. CODE § 3-5-2-40.5 ; § 3-11-8-25.1. The proof of identification must show the name of the individual to whom the document was issued, and the name must conform to the name in the individual's voter registration record. *See* § 3-5-2-40.5(1). In addition, the document must include an expiration date and must expire after the date of the most recent general election. *See* § 3-5-2-40.5(3). Photo identification that does not include an expiration date will not be accepted. The only exception to the photo identification requirement is for an individual who votes "in person at a precinct polling place that is located at a state licensed care facility where the voter resides." § 3-11-8-25(e) . Indiana law requires all other voters, whether they are voting in Indiana for the first time or the twentieth time, to present photo identification before casting an official ballot.

Indiana law imposes additional identification requirements on voters who registered to vote by mail and have not previously voted in a general election in Indiana. *See* § 3-7-33-4.5(a). In addi-

tion to the photo identification described above, first-time voters who register by mail must *also* present to the poll clerk "current and valid photo identification" or a "current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter." § 3-11-8-25.2(b).[4] According to the 2007 Indiana Election Day Handbook provided by the Indiana Secretary of State and the Indiana Election Division, a current and valid photo identification that meets the additional documentation requirement must contain "the voter's current name and address." 2007 INDIANA ELECTION DAY HANDBOOK 13 (July 2007). Although an Indiana driver's license may meet both identification requirements if it did not expire on or before the most recent general election and contains the voter's current name and address, first-time voters who register by mail and do not have Indiana driver's licenses may be required to present two forms of identification before casting an official ballot: one issued by the United States or the state of Indiana that includes the voter's name, photograph, and an expiration date after the date of the

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[4] Indiana enacted its first identification requirement in 2003, subsequent to the enactment of the Help America Vote Act of 2002. In 2005, the Indiana legislature amended the Indiana Code to require all voters to present photo identification. The legislature also amended the original identification requirement to clarify that the requirement for first-time voters who had registered to vote by mail would be in addition to the proof of identification requirement applicable to all voters. *See* 2005 Ind. Legis. Serv. P.L. 109-2005 (S.E.A. 483).

most recent general election, and one that contains the voter's current name and address. Any first-time voter who registered to vote by mail and who cannot produce both forms of identification will not be permitted to cast an official ballot.[5] Taken as a whole, the Indiana requirements are inconsistent with federal law, and unduly burdensome to the right to vote, and to have that vote counted.

D. HAVA Identification Requirement Preempts Indiana State Law.

HAVA's identification requirement preempts the state law requirement that all Indiana voters present photo identification before casting an official ballot. Preemption may be either expressed or implied, but it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). HAVA very clearly and explicitly addressed what form of identification is necessary to vote in a federal election, and who is required to present such identification.

In those instances where there is no formal statement of preemption, the Court looks to statutory language, the structure and purpose of the

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[5] In addition, because the Indiana statute is unnecessarily complicated with respect to the treatment of first-time voters, it will undoubtedly confuse precinct workers and lead to different voters being subject to different standards.

statute, and congressional intent. *See id.* at 96; *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000). Here, Indiana law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By requiring all voters to present at least one form of photo identification before casting an official ballot in federal elections, the Indiana legislature has rendered inconsequential the careful balance struck by Congress in enacting the Help America Vote Act of 2002. The Indiana requirements provide voters with fewer options for verifying their identity rather than more options; they make it harder to vote, rather than easier. *See* 148 CONG. REC. S2536 (2002) (statement of Sen. Dodd).

By enacting HAVA, it was Congress's expressed intent to impose mandatory federal requirements upon the states. This is not a case where Congress has not conveyed its purpose clearly, nor is the purpose of the Congress unexpressed or ambiguous. On the contrary, the directions of the Congress were explicit, and its purpose clear. *See United States v. Culbert*, 435 U.S. 371, 379 (1978) (where "Congress has conveyed its purpose clearly, ... we decline to manufacture ambiguity where none exists"); *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (presumption that Congress does not intend to change federal-state balance applies only "when we are uncertain about the statute's meaning"; it is "not to be used 'in complete disregard of the purpose of the legislature'") (quoting *United States v. Bramblett*, 348 U.S. 503,

510 (1955)); *but see United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous."). First-time voters who register to vote by mail must present current and valid photo identification or a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. *See* 42 U.S.C. § 15483(b). Congress rejected as too restrictive any extension of this requirement to other voters, or any limitation on the type of identification required. To allow states to impose such restrictive requirements would be to preclude the accomplishment and execution of Congress's purposes and objectives. *See Hines*, 312 U.S. at 67.

Congress crafted a specific list of acceptable forms of identification and narrowly defined the class of voters to whom the identification requirement would be applied. Although it left states some discretion in devising specific methods of complying with the requirements, the requirements themselves were mandatory. *See* 42. U.S.C. § 15485 . Accordingly, while the manner of achieving such requirements may vary, any failure to

comply with the requirements is a violation of federal law.

HAVA does not preclude states from establishing their own election technology and administration requirements, as long as such requirements are not inconsistent with federal requirements. *See* 42 U.S.C. § 15484. States are granted leeway in the implementation of certain requirements only to the extent that the state's manner of implementing the requirements does not conflict with HAVA's overall purpose. For example, states wishing to adopt election equipment testing and certification regimes that are more rigorous than the systems required by HAVA would be permitted to do so because the adoption of more rigorous systems is consistent with the text of the statute as well as the Act's intended purpose. HAVA does not, however, grant states the discretion to ignore federal mandates, nor does it allow states to alter the scope of a federal requirement to suit its own purposes. Accordingly, while HAVA can be reasonably read to allow a state to determine how it would comply with the identification provision, it does not allow a state to substitute its judgment for Congress's when defining the form of identification required. Nor does it allow states to define the class of voters to whom the identification requirement would apply.

A state may not impose a requirement that is inconsistent with the corresponding HAVA re-

quirement. *See* 42 U.S.C. § 15484.[6] The photo identification requirement in the Indiana statute is "inconsistent" with the HAVA identification provisions because it does not allow voters the option of presenting different types of identification. Congress specifically included a list of alternative

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[6] HAVA prohibits a state from enacting election technology or administration requirements that are either inconsistent or less strict than the corresponding federal requirement. *See* 42 U.S.C. § 15484. The statute does not require that the state requirement be both inconsistent *and* less strict in order to be prohibited. The Indiana statute, however, fails on both counts. In addition to being inconsistent with the federal identification requirement, the Indiana requirement is less "strict" in the sense that it diminishes HAVA's central purpose: it makes it harder for eligible to vote, rather than easier. In *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004), the 6th Circuit Court of Appeals approved an Ohio statute that required individuals wishing to cast provisional ballots to sign affidavits that affirmed less information than the affidavits required in HAVA. The statute was approved because it "ask[ed] less of voters than HAVA permits." *Id.*; *see also id.* ("HAVA's requirements 'are minimum requirements,' permitting deviation from its provisions provided that such deviation is 'more strict than the requirements established under' HAVA in terms of encouraging provisional voting."). By requiring less information on the affidavit, the Ohio statute made it easier for people to vote; it was more "strict" because the end result of its deviation was to achieve one of the federal law's primary objectives (i.e., widespread availability of provisional balloting). Here, by requiring all voters to provide photo identification, and by failing to allow for an alternative form of identification, the Indiana statute asks more of voters than HAVA permits. It is less "strict" because the end result of Indiana's deviation from the federal requirement is to negate one of HAVA's primary objectives: to protect an eligible voter's right to vote, and to have that vote counted.

forms of identification that could be used by individuals in lieu of photo identification. *See* 42 U.S.C. § 15482(b)(2)(A)(i)(II). If Congress intended to require voters to present a specific type of photo identification in order to vote, then it would not have defined the scope of permissible identification to include utility bills, bank statements, paychecks, and other government documents. *See id.* The Indiana statute is also inconsistent with the federal requirement because it is not limited in its applicability. Rather than applying only to first-time voters who registered by mail, the photo identification requirement applies to all voters in the state of Indiana. By omitting the alternative forms of identification, and by requiring all voters to present identification, the Indiana statute is inconsistent with both the letter and the intent of the federal statute.

To allow Indiana to require all voters to present photo identification renders meaningless the compromise reached by Congress in enacting a voter identification requirement for first-time voters. Accordingly, because the Indiana statute is inconsistent with HAVA's voter identification provision, federal law preempts the Indiana requirement that all voters present photo identification.

CONCLUSION

For the foregoing reasons, the Court should find that with respect to federal elections, the Indiana photo identification requirement is preempted by the Help America Vote Act of 2002. The judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* GEORGIA SECRETARY OF STATE KAREN C. HANDEL IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interests of the Secretary of State of Georgia, Karen C. Handel, in presenting this brief to the Court, are unique compared to other *amici*. The Georgia experience presents a real-life demonstration that the operation of a photographic identification ("photo ID") requirement for voting creates no impairment or disenfranchisement of the right to vote. Additionally, after two years of litigation in both state and federal courts in Georgia, including extensive discovery, a series of preliminary injunction hearings, and finally a trial on the merits in the district court, Georgia's experience demonstrates the palpable lack of injury to any voter and the paucity of the constitutional challenges to the photo ID requirement.

As the chief election official for the State of Georgia, Secretary Handel is responsible for ensuring the integrity of the state's elections. Secretary Handel believes that the Indiana photo ID law, like Georgia's own statute, protects against in-person voter fraud, which is otherwise nearly impossible to detect without a photo ID requirement. She also believes that election integrity requires her office to educate all

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or her counsel made a monetary contribution to its preparation or submission.

eligible voters of voting requirements, including the photo ID requirement. Therefore, following the district court's decision upholding the Georgia law, Secretary Handel undertook and continues an extensive voter education program, similar to Indiana's, to ensure that all eligible Georgia voters who desire to vote in person have the required photo ID, understand how to obtain a free photo ID if they need one, or are apprised of their ability to vote a mail-in absentee ballot without any excuse for doing so and without a photo ID. Secretary Handel is concerned that other *amici* have not accurately described either the implementation of Georgia's photo ID law or the decision of the district court in reviewing and upholding the photo ID requirement.

Consequently, Secretary Handel as *amicus curiae* submits this brief to assist the Court in evaluating a photo ID requirement in both legal and practical terms and in support of the State of Indiana in this appeal. Secretary Handel asserts that a photo ID requirement is an important option for all states to have available to protect against voter fraud. A photo ID requirement is consistent with this Court's standards for reviewing and sustaining election laws and should not be overturned based upon some hypothetical third party concerns which have not materialized in actual implementation of the requirement.

SUMMARY OF ARGUMENT

Indiana's requirement of the presentation of a photo ID for in-person voters in order to guard against voter fraud at the polls is rationally related to the state's important regulatory interest in protecting the integrity of the election process. This Court's precedent supports the Seventh Circuit Court of Appeals' opinion that when there is no evidence of any undue burden imposed upon voters by an election statute and there is a recognized justification for the state's regulation, strict scrutiny will not be applied. Because it is nearly impossible to detect in-person voter fraud without a photo ID requirement, it is within the authority of state legislatures to choose that option of voter identification at the polls.

Georgia law requires that persons appearing to vote in-person either present one of many types of government-issued photo ID cards or vote a provisional ballot and return to the registrar with an appropriate photo ID within two days of the election. After two years of federal and state court challenges to the enforcement of Georgia's statute, all challenges ultimately have been rejected. Despite the predictions of widespread disenfranchisement resulting from the photo ID requirement, no plaintiff in any of the Georgia litigation, either as an individual or as an organization, demonstrated any injury which provided him or it with standing to challenge the photo ID requirement. Furthermore, after trial, the United States District Court for the Northern District of Georgia not only dismissed the case for lack of

standing but also went on to address the merits of the plaintiffs' claims and concluded that the case failed on the merits as well. Following the district court's decision, Georgia conducted two series of elections in over two hundred jurisdictions across the state in which the photo ID requirement was universally applied. There has not been one single demonstrated deprivation of any right to vote or any other violation of a constitutional or statutory right resulting from the photo ID requirement. Contrary to Petitioners' and other *amici's* hypothetical protestations, there has been no showing of any voter disenfranchisement due to the photo ID requirement for in-person voting.

Like the legislature in Indiana, Georgia's General Assembly chose to address the potential for voter fraud at the polls through passage of a photo ID law, a decision representing the judgment of elected representatives. This Court should not overturn the Indiana legislature's judgment because of any alternative proposal propounded by a partisan group of Petitioners and other *amici* when the state-elected representatives' choices are supported by the constitutional standard of review.

ARGUMENT

I. The State of Indiana, Through Its Elected Legislature, Has Demonstrated a Reasonable and Rational Basis for Its Photo ID Requirement, Which Imposes No Undue Burden on Any Voter.

The very foundation of Petitioners' cases before this Court is built on the faulty assumption that Indiana's photo ID law, and presumably any law requiring the presentation of a government-issued photo ID for in-person voting, is subject to heightened scrutiny under this Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992). That assumption is incorrect, in conflict with the precedent of this Court, and does not support Petitioners' position.

The authority to regulate elections, including "the initial task of determining the qualifications of voters," is given to the various states because "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (citing U.S. CONST. art. I, § 1, cl. 1); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.").

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, *or the*

> *voting process itself*, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends."

Burdick, 504 U.S. at 433 (emphasis added) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Because state regulation is absolutely necessary to ensure that the electoral process is fair and honest, state election laws are, generally, not subject to strict scrutiny review. "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

Instead, in determining the level of scrutiny applicable to a challenged state election law, this Court has prescribed a balancing test in which "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" are weighed against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. Under this sliding scale analysis, only when the restrictions placed on voting rights are "severe" will the regulation be subjected to strict scrutiny. *Burdick*, 504 U.S. at 434. "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," the rational basis test is

applied, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

The argument of Petitioners and the *amici curiae* Current and Former Secretaries of State ("the *Amici* Secretaries") that the Indiana photo ID law should be subjected to strict scrutiny and invalidated on grounds that there is little evidence of voter impersonation ignores two important points. First, in-person voter fraud is extremely difficult to detect, as the Court of Appeals recognized in deciding the Indiana case below. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (describing the difficulty in apprehending and prosecuting voter impersonators); *see also In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 25 (2007) ("[W]ithout a personal identification requirement it is nearly impossible to detect in-person voter fraud. In-person voter fraud is, by its very nature, covert."). On this point, the experience and opinion of Secretary Handel, who is currently charged with regulating and has regulated elections within the State of Georgia, is consistent with the Seventh Circuit Court of Appeals' reasoning. Without a photo ID requirement for in-person voting, it is nearly impossible to catch an imposter who casts a vote for another registered voter on Election Day, particularly when the actual registered voter does not cast a vote in that election which, according to voter turnout statistics, sadly is more likely to be the case than not. In such case, no opportunity even arises for

a poll officer to question that two individuals have appeared to vote and are claiming to be the same person. Absent such an obvious controversy regarding a voter's identity or the happenstance that a poll worker actually knows the real voter by sight, there is virtually no other practical way to assure that the person appearing to vote is actually the registered voter entitled to vote.

Second, suggestions by Petitioners and the *Amici* Secretaries that the elected legislature of Indiana, and presumably all other states, should choose some other method for validating the identity of a voter appearing at a polling place cannot serve as a basis for invalidating Indiana's photo ID law. The legislature alone – not political parties (such as Petitioners) or executive branch officers (such as the *Amici* Secretaries) – is vested with the responsibility to impose its own preferred methods for addressing voter fraud.

Additionally, only the legislature is accorded the judgment to determine the timing and extent of its response. For example, this Court has emphasized that elected officials should be permitted to respond to electoral process deficiencies "with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). "[E]laborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Likewise, a legislature is not required to solve all possible evils at once and may choose among various alternatives,

even if the chosen alternative will not completely eliminate the evil.

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *The legislature may select one phase of one field and apply a remedy there, neglecting the others.* The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (emphasis added); *accord FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993); *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.").

The Indiana General Assembly, as did the Georgia General Assembly, chose to address the potential for voter fraud at the polls through the passage of a photo ID law. These enactments represent the considered judgments of elected representatives regarding how best to address the potential and real issues of voter fraud and, as a matter of law, cannot be reversed by the second-guessing of non-legislators.

Nonetheless, both Petitioners and the *Amici* Secretaries persist in offering alternative proposals for addressing the very real concern of in-person voter fraud. The fatal flaw in their arguments is that neither Petitioners nor the *Amici* Secretaries are empowered to make such legislative decisions. Furthermore, the proposed solutions they offer are impractical, inconsistent with federal law, or completely ineffective against potential in-person voter fraud.

Amici Cox and Willis, former Secretaries of State, praise the still-to-be-developed technologies which might allow an electronic comparison of in-person voters' signatures obtained at the polling place with scanned signatures from voter registration applications. Notwithstanding this hope of an alternative solution to be provided through future technology, in her testimony in the Georgia photo ID case, *Amicus* Cox actually argued against such a solution as being impractical. At that time, when she still bore the official responsibility for assuring fair and accurate elections in the state, *Amicus* Cox testified that either an electronic or even manual signature match done at the polls would be extremely time-consuming and that Georgia lacked the technology to make such comparison. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1353 (N.D. Ga. 2005). As former Secretary Cox recognized then, the proposal to match signatures at the polls simply presents no real alternative to the photo ID verification process.

Petitioners and the *Amici* Secretaries also propose that persons seeking to register to vote validate

their identity at the time of registration. This proposed solution conflicts with federal law and does little to address the real issue of in-person voter fraud at the polls.

A state's imposition of additional identification requirements for voter registration would be inconsistent with both the National Voter Registration Act of 1993 ("NVRA"), *codified at* 42 U.S.C. § 1973gg, *et seq.*, and the Help America Vote Act of 2002 ("HAVA"), *codified at* 42 U.S.C. § 15301, *et seq.* The NVRA makes it easier for all Americans to register to vote and maintain their registration. *See* 42 U.S.C. § 1973gg(b)(1); *Welker v. Clarke*, 239 F.3d 596, 598 (3d Cir. 2001) ("One of the NVRA's central purposes was to dramatically expand opportunities for voter registration. . . ."). That voter registration process mandated by Congress provides that any qualified individual may register to vote in a wide variety of methods, including by simply mailing in a registration postcard.[2] Likewise, HAVA permits registration by mail without identification as long as the voter then presents one of several forms of identification

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[2] Congress recognized that this mail-in voter registration process implicated questions of voter fraud at the polls, and therefore Congress subsequently addressed that issue when enacting HAVA. Under HAVA, first-time voters who register by mail must still show some indicia of reliability as to their identity either when they mail in their registration card or when they first vote after such a mail-in registration. *See* 42 U.S.C. § 15483(b).

when the voter votes for the first time. *See* 42 U.S.C. §§ 15483(b)(1)(A) & (2)(A).

Furthermore, this proposed verification-at-registration process provides no solution to the underlying issue of in-person voter fraud. Merely requiring a voter to show photo ID when registering to vote does not prevent a different voter from voting in person at the original registrant's polling place if there is no photo ID requirement at the polls.

The Indiana General Assembly chose, as did the Georgia General Assembly, to address the potential for voter fraud at the polls through the passage of a photo ID law. These enactments represent the considered judgments of elected representatives regarding how best to address the potential and real issues of voter fraud. Reviewing courts generally should defer to an elected legislature's judgment because "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which [] judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). The legislative choices made by Indiana, like the similar choices made by the legislature in Georgia, should be respected by this Court, particularly because the burden on the voter, if any, is slight. The partisan litigation which has erupted over photo ID requirements cannot substitute for the give and take of the legislative process that produces a state's laws.

II. The Facts Underlying the *Common Cause / Georgia v. Billups* Decision Support the Upholding of Indiana's Photo ID Requirements.

The *Amici* Secretaries inaccurately recite the underlying facts and legal decisions in the *Common Cause / Georgia v. Billups* litigation in the Northern District of Georgia, in which the district court entered final judgment in favor of the State and upheld the validity of Georgia's photo ID requirement for in-person voting. Most tellingly, the *Amici* Secretaries' discussion in the body of their brief is limited to only the initial version of Georgia's photo ID Act, which was repealed in 2005 and replaced in 2006. It is the latter version of the statute which was reviewed and upheld by the district court in 2007 and which is in effect in Georgia. Indeed, the *Amici* Secretaries refer to the currently effective 2006 Georgia photo ID Act only in a footnote and then only to state (incorrectly) that the district court's most recent decision "lifted its injunction against the amended statute." (Br. for *Amici* Secretaries at 18-20.) In fact, the district court's most recent decision, which totally rejected all challenges to the Georgia photo ID requirement, both on standing and on the substance of the constitutional claims raised, represents much more than the lifting of an "injunction against the amended statute." The decision of the district court presents a thorough discussion of the implementation of a photo ID statute, the appropriate legal analysis that should be used in evaluating the attacks on photo ID

requirements, and an assessment of Petitioners' predictions of rampant disenfranchisement allegedly resulting from a photo ID requirement. All of this valuable and relevant information presents the Court with support for upholding Indiana's own requirements.

A. The Requirements of the Georgia Photo ID Statute.

Under Georgia law, there are six separate designations of the type of government-issued photo IDs which may be used to verify a voter's identity when that voter appears in person at the polls.[3] They include:

> (1) A Georgia driver's license which was properly issued by the appropriate state agency;
>
> (2) A valid Georgia voter identification card issued under [O.C.G.A. §] 21-2-417.1 or other valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state,

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[3] Under Georgia law, a voter may vote absentee by mail, without providing any excuse for doing so, starting 45 days prior to an election. *See* O.C.G.A. § 21-2-385. Other than HAVA requirements for persons who registered to vote for the first time by mail, there is no photo ID requirement for voting absentee by mail, and absentee voters' identities are verified instead by signature comparison between original voter registration materials and absentee ballot applications. *See* O.C.G.A. § 21-2-386.

> or the United States authorized by law to issue personal identification, provided that such identification card contains a photograph of the elector;
>
> (3) A valid United States passport;
>
> (4) A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;
>
> (5) A valid United States military identification card, provided that such identification card contains a photograph of the elector; or
>
> (6) A valid tribal identification card containing a photograph of the elector.

O.C.G.A. § 21-2-417(a)(1)-(6). If a person appears to vote in person and does not have an acceptable form of identification, that person may vote a provisional ballot which will be counted if the voter's identity is verified within two days after the election. *Id.* §§ 21-2-417(b) & -419. Additionally, if a voter is a first-time voter who registered by mail (and is therefore covered by the identity provisions of HAVA), HAVA's ID requirements are applied rather than the above-listed ones. *Id.* § 21-2-417(c). Finally, if a registered voter does not otherwise have a valid photo ID, the voter can obtain one for free from the county registrar's

office or any location of the Department of Driver Services. *Id.* §§ 21-2-417.1 & 40-5-103(d).

B. After Extensive Discovery, Preliminary Hearings, and a Trial on the Merits, the Georgia Photo ID Statute Was Upheld and Successfully Applied in Elections Conducted in Numerous Jurisdictions Across the State.

Virtually since inception, Georgia's photo ID requirements have been under attack in both state and federal courts. Ultimately, however, all such challenges have been rejected either on their merits or because none of the individual or organizational plaintiffs were able to demonstrate any injury sufficient to provide them with standing to pursue their claims.

Initially, the district court entered a preliminary injunction against enforcement of the original version of the statute, ruling that the lack of availability of a free form of photo ID for voting purposes might, in some circumstances, amount to a poll tax. *See Common Cause/Ga. v. Billups* ("*Common Cause/Ga. I*"), 406 F. Supp. 2d 1326, 1338-39, 1354-55, 1377 (N.D. Ga. 2005). Shortly thereafter, the Georgia General Assembly repealed the 2005 photo ID Act and enacted the 2006 photo ID Act, which provided for the availability of free voter ID cards in all of Georgia's 159 counties.

The district court plaintiffs then amended their complaint to challenge the provisions of the 2006 photo ID Act. *See Common Cause/Ga. v. Billups* (*"Common Cause/Ga. II"*), 439 F. Supp. 2d 1294, 1298 (N.D. Ga. 2006). Over the next three months the district court issued two more preliminary injunctions preventing enforcement of the photo ID requirements in upcoming elections, citing the short period of time since the passage of the photo ID requirement and preserving the status quo while the parties continued to prepare for the ultimate trial on the merits. The first of those preliminary injunctions resulted from a hearing held on July 12, 2006, only six days before the 2006 primaries. *See id.* at 1300, 1360. Although enjoining enforcement of the photo ID requirement in that particular election, the district court noted it would revisit the issue with respect to future elections. *See id.* at 1360. Indeed, the district court had another opportunity to do so two months later when addressing upcoming special elections to be held in September 2006 and again enjoining the enforcement of the photo ID requirement on the eve of these elections. *See Common Cause/Ga. v. Billups* (*"Common Cause/Ga. III"*), 504 F. Supp. 2d 1333, 1341 (N.D. Ga. 2007).

Simultaneously with these challenges in federal court, other plaintiffs attempted state court challenges to the same photo ID statute, alleging that the Georgia General Assembly did not even have the constitutional authority to require voters to identify themselves in any manner when voting. Although a lower court initially found in the plaintiffs' favor, that

ruling was reversed. Despite bringing two separate state court cases, the plaintiffs could never produce a single plaintiff who had standing to pursue this claim, so ultimately the challenge came to naught after review by the Georgia Supreme Court. *See Berry v. Perdue*, No. 06CV4751-7 (DeKalb County Super. Ct. filed Apr. 12, 2006, voluntarily dismissed June 30, 2006); *Perdue v. Lake*, 282 Ga. 348, 647 S.E. 2d 6, 7 (2007).

During the pendency of the state court cases, the district court stayed all proceedings in the federal action. Once the plaintiffs' standing problems had ended the state law challenge, though, the federal case was again ripe to move forward to a trial on the merits in district court. A three-day bench trial was held from August 22 to 24, 2007. *Common Cause/Ga. III*, 504 F. Supp. 2d at 1337, 1342. For their part, the plaintiffs offered a number of witnesses, including two experts, and numerous exhibits.

The district court issued its final judgment on September 6, 2007, rejecting all of the plaintiffs' claims and upholding the constitutionality of Georgia's 2006 photo ID Act. In support of its holding, the court stressed the following points. First, the court emphasized that none of the individual plaintiffs to the litigation had standing to sue, and none of the organizational plaintiffs showed the existence of a member who would be harmed by the 2006 photo ID Act or harm to the organization independent of its membership, either of which would provide the organizations with standing to sue. *See id.* at

1371-74. Second, the court stated that, although the plaintiffs alleged a litany of burdens at the preliminary injunction hearings, they "failed to produce admissible evidence to that effect at trial." *Id.* at 1377. The court explained the distinction between its final judgment and its preliminary injunctions by stating:

> The Court acknowledges that in its previous Orders addressing the preliminary injunction motions, it concluded that the Photo ID requirement severely burdened voters. It is important to note, however, that the preliminary injunction motions were made at an earlier stage of the litigation and were made under more relaxed evidentiary standards. Here, however, Plaintiffs must actually prove their contentions by a preponderance of the evidence, using evidence reduced to an admissible form. Plaintiffs have failed to do so here.

Id. at 1379. Third, the court recognized the State of Georgia's educational efforts, *see id.*, which previously were hampered by both ongoing federal and state court litigation and the requirement that the State of Georgia await Section 5 preclearance on the 2006 photo ID Act, and emphasized that

> the State has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free DDS-issued Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the

> voters that they can vote absentee by mail without a Photo ID.

Id. at 1380.

Finally, quoting the Indiana district court decision, the Georgia district court noted that "Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to the [2006 photo ID Act] because of his or her inability to obtain the necessary photo identification." *Id.* (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006)).

> [A]lthough Plaintiffs claim to know of people who claim that they lack Photo ID, Plaintiffs have failed to identify those individuals. The failure to identify those individuals "is particularly acute" in light of Plaintiffs' contention that a large number of Georgia voters lack acceptable Photo ID. . . . As the *Rokita* court noted, voters who lack Photo ID undoubtedly exist somewhere, but *the fact that Plaintiffs, in spite of their efforts, have failed to uncover anyone "who can attest to the fact that he/she will be prevented from voting" provides significant support for a conclusion that the Photo ID requirement does not unduly burden the right to vote.*

Id. (emphasis added) (quoting *Rokita*, 458 F. Supp. 2d at 823).

In short, contrary to the representation of the *Amici* Secretaries and other *amici* who have filed

briefs in support of Petitioners' position, the *Common Cause/Georgia* litigation and concurrent state court litigation in Georgia establish that, despite the two-year efforts of multiple plaintiffs, not a single voter could be located who was unduly burdened by Georgia's requirement for the presentation of a photo ID for in-person voting.

C. No Evidence Exists That Hundreds of Thousands of Georgia Voters Lack Photographic Identification.

The *Amici* Secretaries also allege that 198,000 Georgia registered voters lack photo identification. (Br. for *Amici* Secretaries at 11, 13, 19.) The *Amici* Secretaries throw this number out as if it were an absolute truth, thereby hoping to imply the existence of an enormous number of voters who must be, by the *Amici* Secretaries' rationale, disenfranchised by the Georgia photo ID requirement. As noted above, the actual Georgia experience – as opposed to a hypothetical experience – shows such is not the case.

When the Georgia photo ID statute was first enacted, over the explicit objections of former Secretary Cox, she instructed her staff to attempt to identify the number of registered Georgia voters who might not have either driver's licenses or photo identification cards issued by the Georgia Department of Driver Services ("DDS"), which are but two of the various forms of photo ID allowable under the Georgia statute. An attempt was made to match the

voter registration list with the list of DDS license or ID cardholders. After the first attempt produced a product full of documented errors, the State Election Board ordered an additional attempt, which resulted in a list that was reduced from the original by almost two-thirds but still flawed. Secretary Handel's more recent third attempt produced the 198,000 figure referred to by the *Amici* Secretaries, but it too contained errors.

The comparison between voter registration records and records for two of the allowable forms of photo ID has proved over time and through various iterations to be neither simple nor overwhelmingly accurate. The estimated numbers of non-matches between the voter registration list and the DDS database fluctuates, depending on the criteria used to define the matching files. The massive amounts of information contained in both agencies' databases is not easily correlated and matched. Data transcription and input errors, as well as missing data, undermine the reliability of the comparisons. Indeed, the matching processes produced many "false positives" (people with driver's licenses or photo ID cards issued by DDS but nonetheless appearing on the no-match list anyway).

The district judge in the *Common Cause/Georgia* litigation recognized that the voter registration-DDS comparison was and continues to be a less than accurate estimation. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1378 ("[T]he testimony in the record established that the large numbers reported on the

DDS no-match list were far from reliable."). In fact, that federal district judge was himself inaccurately included on the first no-match list. *See id.* at 1378 n.6 (noting, in discussing unreliability of the no-match lists, that "the undersigned appeared on one of the no-match lists"). Additionally, the results of the match, whatever they were from day to day and depending on the criteria applied, was less than probative because the matches could not or did not take into account the numerous other types of photo identification that qualify for in-person voting under the Georgia requirement. *See* O.C.G.A. § 21-2-417(a).

As is discussed further in section III *infra* and contrary to the allegation by *Amici* Secretaries that "hundreds of thousands" of Georgia voters have been harmed (Br. for *Amici* Secretaries at 13), Georgia's real-life and practical experience has shown that there is no such disenfranchisement caused by a photo ID requirement. To some extent, Georgia has now conducted the ultimate "scientific experiment" to test the photo ID requirement – actual elections using the photo ID requirement – without any of the dire consequences occurring, as propounded by both Petitioners and the *amici* who support their position before this Court.

Indeed, the Georgia experience comports with Justice Stevens' urging in *Purcell v. Gonzalez*, __ U.S. __, 127 S. Ct. 5 (2006), where he noted:

> Allowing the election to proceed without enjoining the statutory provisions at issue will

> provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

127 S. Ct. at 8 (Stevens, J., concurring). Georgia has shown that there is no scope at all to the alleged disenfranchisement of voters and, with the implementation of a photo ID requirement, the state is finally given the opportunity, actually and meaningfully, to verify a voter's identification at the polling place.

D. The District Court in the *Common Cause / Georgia* Litigation Found That the Evidence *Amici* Secretaries Cite Regarding the Georgia Photo ID Law's Effect on the Poor, the Elderly, and Minorities Was Unreliable and Consequently Inadmissible.

Petitioners and the *Amici* Secretaries also allege as ironclad fact claims that photo ID laws more adversely affect elderly, poor, and minority voters because these voters are less likely to have the

required photo identification. (Br. for Ind. Democratic Party Pets. at 12 n.8, 16-17, 34; Br. for Crawford Pets. at 13; Br. for *Amici* Secretaries at 10-13.) The *Amici* Secretaries even state that this allegation is "consistent with the[ir] experience" in Georgia and cite as support a paper by University of Georgia professors M.V. Hood III and Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* 19 (2007), *available at* http://www.votecaltech.edu/VoterID/GAVoterID (Bullock-Hood).pdf. Such claims are in direct conflict with the evidence presented at the Georgia trial on the merits and as evaluated by the district court.

The *Amici* Secretaries have declined to discuss the fact that the plaintiffs in the *Common Cause/Georgia* litigation attempted to offer Dr. Hood, the source of the data on which they rely, as an expert based on the aforementioned paper and another report he prepared. However, the district court excluded Dr. Hood's testimony, his paper, and his report as inadmissible pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Furthermore, the paper now relied on by Petitioners and the *Amici* Secretaries was at the time of trial still undergoing a peer review process and, based upon comments previously made, the authors had been requested to revise and resubmit the paper because of flaws in the analysis. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1371 ("Dr. Hood's opinions and testimony fail to satisfy *Daubert*, and, for the most part, are irrelevant to the issues before the Court.").

Accordingly, despite the representations by Petitioners and the *Amici* Secretaries, there is absolutely no probative evidence from the *Common Cause/Georgia* litigation that photo ID laws affect elderly, poor, and minority voters more adversely than other voters. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1378 ("Further, although Plaintiffs contended at the preliminary injunction hearing that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a DDS service center or a county registrar's office, the evidence in the record fails to support that contention.").

III. There Is No Evidence to Support the Allegation or Prediction That Any Individual Voter's Right to Vote Is Burdened by the Photo ID Laws in Either Indiana or Georgia.

The challenges to photo ID laws across the country have been based primarily upon the "Chicken Little" paranoia that there are hundreds of thousands of voters who may lack the required photo ID to vote in person at the polls, are unable to get the required photo ID, and therefore would be completely prohibited from voting. The truth lies elsewhere.

First, there is absolutely no support for the notion that there are hundreds of thousands of people with none of the acceptable forms of photo ID. In fact, after hearing all of the evidence in the case and even allowing the record to remain open for the plaintiffs

to attempt to gather evidence of people being disenfranchised by the requirement, the district court in Georgia concluded precisely the opposite. "[A]lthough Plaintiffs claim to know of people who claim that they lack Photo ID, Plaintiffs have failed to identify those individuals. The failure to identify those individuals 'is particularly acute' in light of Plaintiffs' contention that a large number of Georgia voters lack acceptable Photo ID." *Common Cause/Ga. III*, 504 F. Supp. 2d at 1380 (quoting *Rokita*, 458 F. Supp. 2d at 823).

Second, there is no evidence to support the charge that any voter who may not have one of the required forms of photo ID is unable to obtain one. In the trial of both the Indiana and Georgia cases, "[d]espite apocalyptic assertions of wholesale voter disenfranchisement," the plaintiffs have failed to produce "a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the photo ID law] because of his or her inability to obtain the necessary photo identification." *Rokita*, 458 F. Supp 2d at 822; *see also Common Cause/Ga. III*, 504 F. Supp. 2d at 1377-78 (reviewing circumstances of each plaintiff and concluding that no undue burden existed as to any of them). Secretary Handel has commenced a broad-scale education program, as did Secretary Rokita, designed to inform voters of the photo ID requirement, ensure that voters who might need a photo ID know how to obtain one, and make certain that election officials are educated about the photo ID requirement and the free IDs. In the federal case and two state cases in Georgia, despite the constant protestations that

hundreds of thousands of people would be disenfranchised by its application, not a single individual plaintiff or organization with *standing* to challenge the photo ID law ever came forward, much less provided any evidence of an undue burden on the right to vote caused by the photo ID requirement.

Finally, since entry of final judgment in the *Common Cause/Georgia* case upholding the Georgia photo ID requirement, 246 jurisdictions in Georgia have conducted elections in which photo IDs were required for in-person voting. In all of those 246 elections, which have been held in both large and small counties and cities throughout the state, a combined total of less than 50 registered voters have shown up at the polls without a photo ID, and those that have shown up without a photo ID have been allowed to vote a provisional ballot and return within two days with their photo ID.[4]

In short, Georgia has now held elections which allow the Court to review photo ID laws in accordance with Justice Stevens' recommendation that such laws be resolved on "historical facts rather than speculation." *Purcell*, 127 S. Ct. at 8. The overwhelming and undisputed result, based on actual facts, is that photo ID

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[4] Although *Amicus* Cox alleges that she is aware of one voter who was unable to vote in a recent municipal election (Br. for *Amici* Secretaries at 15), *Amicus* Cox never reported that alleged problem to her successor, did not take advantage of the 1-800 help line, or call any of Secretary Handel's election division staff (some of whom previously worked for *Amicus* Cox) to inform them of the alleged problem.

laws do not unduly burden the right to vote in violation of the U.S. Constitution.

CONCLUSION

For the reasons set forth above, *amicus curiae* urges the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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In The
Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,

Respondents.

On Writs Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD L. HASEN IN SUPPORT OF PETITIONERS [*BURDICK* REASONABLE TAILORING]

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Richard L. Hasen is a law professor with a strong interest in election law and election administration issues. Hasen, the William H. Hannon Distinguished Professor of Law at Loyola Law School, has written over three dozen articles (and parts of books) on election law, is the co-author of an election law casebook, *Election Law—Cases and Materials* (3d ed. 2004), with Professor Daniel Hays Lowenstein, and is the co-editor of the peer-reviewed quarterly publication, *Election Law Journal.* Hasen's affiliations are listed for identification purposes only.

With the consent of the parties, whose letters of consent have been filed with the Clerk of the Court, *amicus* respectfully submits this brief in support of the Petitioners.[1] The brief explains that developments since the 2000 Florida election controversy have increased the need for this Court to articulate clear and fair rules to resolve election administration disputes. It suggests that the Court clarify existing standards for resolving such disputes and urges the Court to reverse the lower court under those clarified standards.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* and his counsel contributed monetarily to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The 2000 Florida election controversy has had profound effects across the United States both in greatly increasing the amount of election law litigation and in undermining the confidence of some groups of voters in the fairness of the electoral process. Although this Court expressed the hope in *Bush v. Gore* that "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting[,]" 531 U.S. 98, 104 (2000), many recent efforts at election administration reform have become mired in partisan controversy. Generally speaking, Republican state legislators have proposed laws, such as strict voter identification laws, that they say will prevent voter fraud, and Democratic legislators have proposed laws they say will prevent voter intimidation and remove barriers to voting, such as Election Day registration.

The greatest controversy has occurred in the realm of voter identification laws. Every state legislature that has passed a voter identification law since 2000 has done so along party lines. Some Democrats believe Republicans have enacted such laws not to prevent fraud but to make it harder for poor and minority voters, who are more likely to vote for Democratic candidates, to vote. Some Republicans believe Democrats oppose such laws because they want to make it easier for ineligible voters supporting

the Democratic Party to vote, or for eligible voters to vote more than once.

Even courts that have considered recent constitutional challenges to voter identification laws have split along party lines, with Republican-elected (or -nominated) judges tending to uphold voter identification laws against constitutional challenge and Democratic-elected (or -nominated) judges voting to strike down such laws. This does not mean, and *amicus* does not suggest, that judges are attempting to benefit their political parties. Rather, judges simply appear to bring to these cases the same perspectives that others with their political affiliations have about the credibility of voter fraud and vote-suppression claims. Nonetheless, decisions rendered along party lines can engender a public perception of partisanship.

In this atmosphere, it is important for this Court to articulate clear and fair rules to resolve election administration disputes that transcend partisan politics and restore voters' faith in the integrity of the electoral process. Most lower courts considering such disputes turn to this Court's opinion in *Burdick v. Takushi*, 504 U.S 428 (1992), or other cases in this line, which articulate a flexible balancing approach to judging the constitutionality of state election laws. But the *Burdick* standard has not been correctly applied by some lower courts to cabin judicial discretion. Those courts have focused on the first part of the test: pegging the level of scrutiny to the character and magnitude of the burden the law places on some

voters. It is an uncertain endeavor, *see Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring) ("I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from" the *Burdick* line of cases), and one that has led to strongly divergent results in similar cases. Finding a severe burden, some courts strike down voter identification laws. Finding a lesser burden, some apply an exceedingly low level of scrutiny that does not require the state to provide any evidence its law is reasonably calculated to serve its interest, and uphold such laws.

That approach misreads *Burdick* and this Court's other relevant precedents and ignores a basic principle of those cases that applies even where there are no severe burdens on voters: a state's election law must be at least reasonably tailored to the interests the law purports to further.

> In passing judgment [on the constitutionality of challenged election laws], the Court must not only determine the legitimacy and strength of each of [the state's asserted] interests; *it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.* Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added). As this Court indicated in *Rosario v. Rockefeller*, the provision in question should be

"*tied to* [the] particularized legitimate purpose" articulated by the state. 410 U.S. 752, 762 (1973) (emphasis added).

This aspect of the test is crucial and should not be ignored by lower courts, especially given the post-2000 partisan atmosphere in which there is the danger that election administration rules are being chosen for partisan advantage. *See Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., joined by Breyer, J., concurring); *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). The misapplication of *Burdick* and related authorities can lead to arbitrary results in similar cases, and arbitrariness can look like political favoritism to voters already concerned about the fairness of the electoral process.

This Court should hold that lower courts, in "consider[ing] the extent to which [state] interests make it necessary to burden the plaintiff's rights," *Anderson*, 460 U.S. at 789, must require states not only to articulate an important state interest—such as preventing election fraud—to justify its challenged election law, but also to provide some credible support for the proposition that its law will further that important interest. Only if the state demonstrates a reasonable fit between its law and the state interests that are implicated is it appropriate to balance those interests with the potential disenfranchisement of voters or other voter burdens.

Enforcing this Court's requirement that the state show that its law is at least *reasonably tailored* to further important state interests *and nondiscriminatory* will invalidate the most partisan of election administration laws that are passed with only the pretext of being motivated to serve an important state interest. The reasonable tailoring requirement is not as strict as the "narrow tailoring" of strict scrutiny and will not undermine the results in this Court's *Burdick* cases—such as those in involving ballot access or the question of who gets to vote in a party primary—which have recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 729 (1974); *see also id.* at 730 ("It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under [this Court's] cases").

Under the appropriate application of the *Burdick* standard, the lower court decision cannot stand. Though preventing election fraud is indeed a compelling interest that justifies any number of state election laws, it cannot justify Indiana's strict photographic identification requirements.

First, the law does impose a severe burden on some voters. Even assuming election fraud prevention justifies a fairly applied voter identification requirement, it cannot justify Indiana's requirement, the strictest approach in the nation, which would

require an indigent voter lacking identification to make *two trips* to government offices (some as far as 30 minutes or more away from the voter's residence) within 10 days at the voter's own expense to cast a ballot that would count.

Second, there was no credible evidence in or outside of the record that impersonation voter fraud is a serious problem today in this country. Indiana itself conceded it had never prosecuted a case of impersonation voter fraud that a voter identification law would be likely to prevent. If the state were really concerned about voter fraud, it would have taken steps to make absentee voter fraud more difficult, given the documented history of that type of voter fraud.

Because Indiana failed to present any evidence that the provision at issue is reasonably tied to the purpose of addressing election fraud, the law should be struck down as a violation of the Equal Protection Clause and the First Amendment right of association whether or not the court concludes the burden the law imposes on voters is "severe."

Finally, this Court should clarify the confusion with *Burdick* balancing that has emerged from *dicta* in this Court's recent opinion in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (*per curiam*). The lower court read *Purcell* as requiring a court to balance the *actual* disenfranchisement costs of voter identification laws with *feelings* of disenfranchisement that could come from voter perception of voter fraud. This Court

should clarify that lower courts should engage in such balancing only if the state can come forward with evidence that voter turnout is in fact being depressed by real or imagined voter fraud.

ARGUMENT

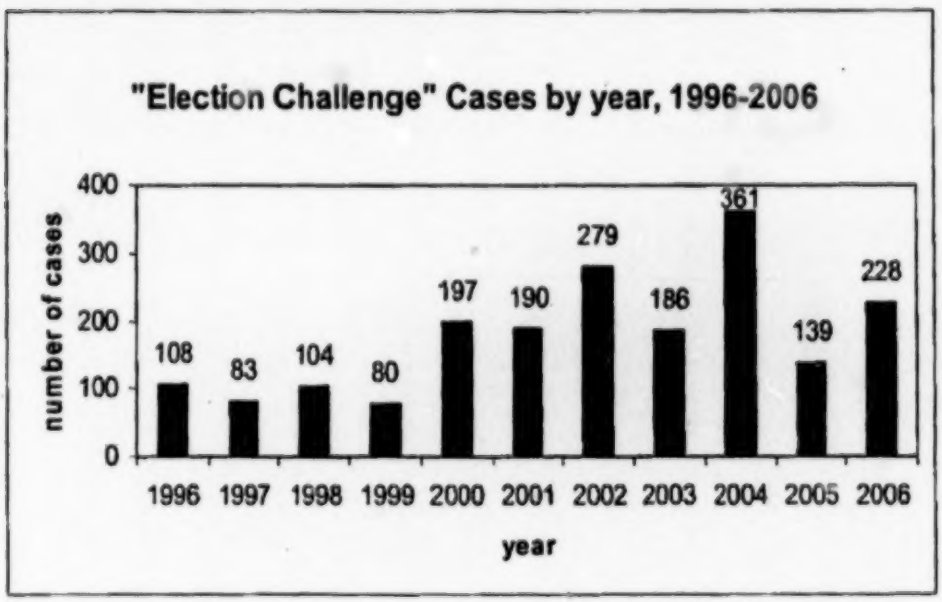
I. THIS COURT SHOULD ARTICULATE CLEAR AND FAIR STANDARDS TO RESOLVE ELECTION ADMINISTRATION DISPUTES.

A. Since the 2000 Florida Election Controversy, There Has Been a Dramatic Rise in the Amount of Election Law Litigation.

While the reasons are unclear, there has been a dramatic increase in the number of election-related cases in the lower courts since the election controversy over the counting of ballots to determine Florida's electoral votes in the 2000 presidential election. There were an average of 96 "election challenge" cases[2] per year in the 1996-99 period, compared to an average of 254 such cases in the 2001-04 period. Richard L. Hasen, *Beyond the Margin of Litigation:*

[2] This count is based upon a Lexis search of state and federal court databases using a year restriction and "election w/p challenge," culling out cases that obviously are inapplicable. The cases are cited and briefly described in two Excel spreadsheets posted at http://electionlawblog.org/archives/washlee%20appendix.xls (1996-2004) and http://electionlawblog.org/archives/stanford.xls (2005-2006).

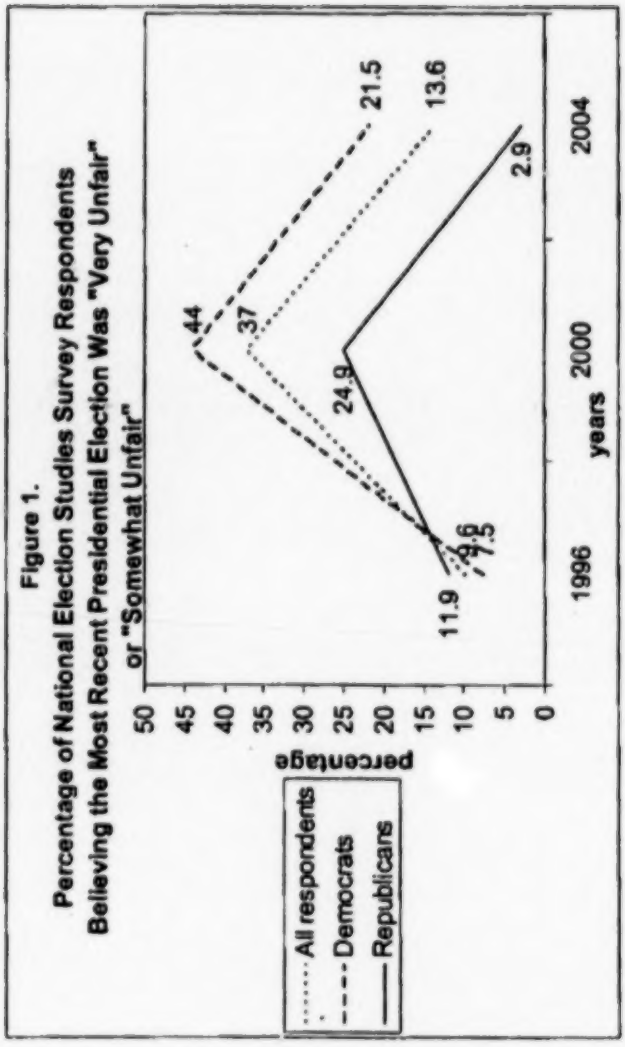
Reforming U.S. Election Administration to Avoid Electoral Meltdown, 62 WASH. & LEE L. REV. 937, 957-58 (2005) [hereinafter, Hasen, *Beyond the Margin*]. The litigation increase over the pre-2000 period has continued in 2005 and 2006 as shown in the figure below, reprinted from Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 29 (2007) [hereinafter, Hasen, *Untimely Death*].



A similar pattern of increased litigation appears when looking only at challenges related to presidential elections. *See* Charles Anthony Smith and Christopher Shortell, *The Suits that Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 253, 262-64 (2007) (finding a large increase in presidential election litigation since 2000, especially in the 2004 period).

B. Some Voters Have Lost Confidence in the Fairness of the Electoral Process, and Public Opinion Polling Shows a Troubling Partisan and Racial Divide.

Since 2000, a growing party and racial divide in public confidence in the fairness of the electoral process has emerged. In 2004, four years after the Florida controversy, 21.5% of Democrats thought the means of conducting the most recent presidential election were "somewhat unfair" or "very unfair," compared to 2.9% of Republicans. Hasen, *Beyond the Margin*, at 943. In that same election only one-third of African-Americans called the vote "accurate and fair." *Id.* at 942. The following figure, from the American National Election Studies as reported at *id.* at 944, shows voter confidence by party in the 1996, 2000, and 2004 elections:



No doubt, some of the disparity in voter confidence is due to the fact that Democrats were on the losing end of the 2000 and 2004 presidential elections, and winners tend to have more confidence in election outcomes than losers. Moreover, judicial involvement in resolving electoral disputes can undermine voter confidence for those on the losing end of litigation:

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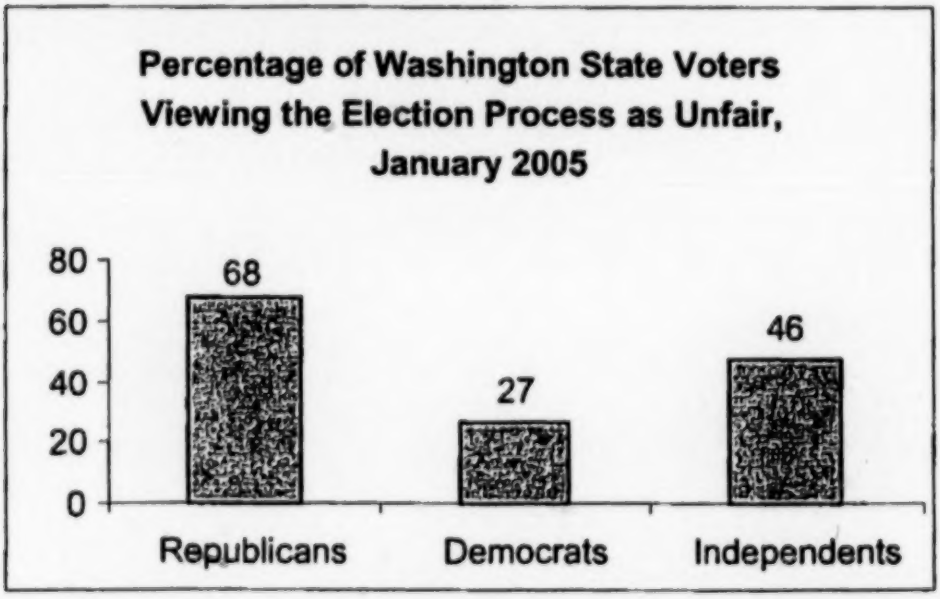
> Consider voter attitudes toward the fairness of the Washington State gubernatorial election in 2004. After a series of recounts and court battles, a Democrat was declared the winner. In a January 2005 Elway Poll of Washington voters, 68% of Republicans thought the state election process was unfair, compared to 27% of Democrats and 46% of Independents.

Id. at 944. The figure below, graphically displays the levels of voter confidence.



But the gap in confidence between winners and losers may not fully explain the patterns of public opinion on voter confidence. Just before the 2006 election, when it already appeared that Democrats were likely to do well in the midterm Congressional elections, the gap between Republican and Democratic views persisted. *See* Hasen, *Untimely Death*, at 25-26. Even more troubling, the percentage of

African-American voters who were "not too confident" or "not at all confident" that their votes would be fairly counted *nearly doubled* from 15% in 2004 to 29% in 2006. News Release, Pew Research Center for the People & the Press, *Democrats Hold Enthusiasm, Engagement Advantage* 6 (Oct. 11, 2006) (http://people-press.org/reports/pdf/291.pdf). In October 2006, Pew's figures on confidence in the vote tally were as follows, *id.*:

Wide Gaps in Confidence about Accurate Vote Tally

	Confident your vote will be accurately conted?			
	Very	Somewhat	Not too/ Not at all	DK
	%	%	%	%
Total	58	29	12	1=100
White	63	28	8	1=100
Black	30	37	29	4=100
Men	63	24	12	1=100
Women	53	33	12	2=100
18-29	49	36	15	0=100
30-49	61	26	11	2=10
50-64	60	29	11	*=100
65+	55	30	11	4=100
Republican	79	17	3	1=100
Democrat	45	36	16	3=100
Independent	52	32	15	1=100

Based on registered voters

C. Election Reform Efforts in the States Have Taken on a Partisan Cast, and Courts Too Have Divided Along Partisan Lines.

Though this Court expressed the hope in *Bush v. Gore* that "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting[,]" 531 U.S. at 104, many recent efforts at election administration reform have become mired in partisan controversy. Generally speaking, Republican state legislators have proposed laws that they say will prevent voter fraud, and Democratic legislators have proposed laws they say will prevent voter intimidation and remove barriers to voting. The fear of each party is that the other side is proposing reforms not to further the important interests in fair and open elections, but to gain partisan advantage.

The greatest controversy has occurred in the realm of voter identification laws.

> With the exception of Arizona, which enacted its voter identification law through a voter initiative (aimed more broadly at issues of benefits for illegal immigrants), every state that has enacted or tightened its requirements for voters to show identification at the polls has done so through the support of a Republican-dominated legislature. Democrats have uniformly opposed the efforts to impose new voter identification requirements, as in Pennsylvania, where the Democratic governor vetoed a new voter identification law passed

> by the Republican-dominated legislature, and in Missouri, where the newly-elected Democratic Secretary of State has opposed voter identification laws and argued against them in a report on the 2006 election.

Hasen, *Untimely Death*, at 19 (footnotes omitted).

Perhaps most disconcerting is that a split has developed along party lines among *judges* deciding challenges to voter identification laws. In Michigan, for example, the five Republican judges on the state's highest court voted to uphold the state's voter identification law, and the two Democrats voted to strike it down. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, ___ N.W.2d ___ (Mich. July 18, 2007); Hasen, *Untimely Death*, at 42 n.201. In the case at bar, the Court of Appeals split along similar lines: the two judges in the majority of the Court of Appeals in this case were appointed by Republican presidents while the dissenting judge was appointed by a Democratic president, and (with one exception) the vote denying *en banc* rehearing split along party lines as well. Hasen, *Untimely Death*, at 42. This does not mean, and *amicus* does not suggest, that judges are seeking to benefit their political parties. Rather, judges simply appear to come to these cases with the same perspectives that others with their political affiliations have about the credibility of voter fraud and vote-suppression claims. Nonetheless, decisions rendered along party lines can engender a public perception of partisanship.

* * *

The rise in election law litigation shows that political parties and others increasingly are using election law as a political strategy to advance their ends. This puts courts squarely in the political thicket, with voter confidence in the electoral process (not to mention the judiciary) at stake. Under the circumstances, lower courts need further guidance. It is important for this Court to articulate clear and fair rules to resolve election administration disputes that transcend partisan politics.

II. *BURDICK* REQUIRES SOME EVIDENCE THAT AN ELECTION ADMINISTRATION LAW IS AT LEAST REASONABLY TAILORED TO FURTHER THE GOVERNMENT'S INTERESTS AND IS NONDISCRIMINATORY.

This Court's *Burdick* line of cases already provides the appropriate rule to address the problems described above, though lower courts—as in this case—have not properly applied it. The reasonable tailoring requirement articulated in *Burdick* for cases of non-severe burdens will lead to the invalidation of partisan electoral rules serving no valid purpose, but leave standing the vast majority of state and local election administration laws. However, the misapplication of *Burdick* can lead to arbitrary results in similar cases, and arbitrariness can look like political favoritism by judges to voters already concerned about the fairness of the electoral process and judicial supervision of it.

In *Burdick*, this Court explained the proper standard to govern the constitutionality of challenged election laws as follows:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, *taking into consideration the extent to which those interests make it necessary* to burden the plaintiff's rights.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. [W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only *reasonable, nondiscriminatory restrictions* upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Burdick, 504 U.S. at 434 (internal quotations and citations omitted; emphases added).

The basic principle articulated in *Burdick* dates back to at least this Court's opinion in *Storer v.*

Brown, which recognized that there is "no litmus-paper test" for resolving these cases and "no substitute for the hard judgments that must be made." 415 U.S. at 730.

Unfortunately, some lower courts have applied something of a caricature of the *Burdick* test. They focus only on the question whether a burden is severe or slight, applying strict scrutiny for "severe" burdens and rational basis review otherwise. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. ___ (2007) (*draft available at* http://ssrn.com/abstract=980079) (citing numerous lower court cases demonstrating that "[i]f the plaintiff establishes to the court's satisfaction that the challenged law will substantially impact electoral participation, especially by disadvantaged voters, the court will characterize the burden as severe and apply strict scrutiny." However, if "the plaintiff fails to make this showing, the court will treat the burden as insignificant or unproven and apply lax scrutiny.") (draft at 7-8, footnotes omitted). The problem is that a binary severe/slight burden test is difficult to apply in close cases. *See Buckley*, 525 U.S. at 208 (Thomas, J. concurring) ("I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from" the *Burdick* line of cases).

It is true that in cases in which plaintiff can demonstrate a severe burden, a court reviewing a challenged election law must apply strict scrutiny.

But for those cases involving something less than a severe burden, rational basis review is not in order. A close reading of *Burdick* shows that even in the case of less severe burdens, it is necessary for courts to consider the question of *tailoring*. Even if a burden on voters is not "severe," the court must examine "the extent to which those interests make it necessary to burden the plaintiff's rights," and whether the law has imposed only "reasonable, non-discriminatory" restrictions on First and Fourteenth Amendment rights of voters. *Burdick*, 504 U.S. at 434; *see also id.* at 438 ("we have repeatedly upheld *reasonable politically neutral* regulations that have the effect of channeling expressive activity at the polls") (emphasis added); *Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of [the state's asserted] interests; *it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights*. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.") (emphasis added).

Thus, in *Clingman v. Beaver*, the Libertarian Party of Oklahoma (LPO) complained about Oklahoma's primary rules, which barred voters registered with other parties from voting in LPO's primary. 544 U.S. at 584-85. Applying the *Burdick* test, this Court held that "Oklahoma's semiclosed primary system does not severely burden the associational

rights of the State's citizenry." *Id.* at 593. The characterization of the burden, however, was the beginning, not the end, of the constitutional analysis. This Court then looked to see that the law was a reasonable means of furthering the state interest at issue. The state of Oklahoma had asserted that its primary rules "preserve[] the political parties as viable interest groups, insuring that the results of a primary election, in a broad sense, accurately reflect the voting of the party members." *Id.* at 594. And the Court found the law tailored to achieve that purpose: "If the LPO is permitted to open its primary to all registered voters regardless of party affiliation, the candidate who emerges from the LPO primary may be unconcerned with, if not . . . hostile to the political preferences of the majority of the LPO's members." *Id.* (internal quotations omitted; alteration in original).

Moreover, the Court found the requirement tied to the state's interest in "facilitating the effective operation of a democratic government" through the classification of voters "according to political affiliations," concluding, "for that classification to mean much, Oklahoma must be allowed to limit voters' ability to roam among parties' primaries." *Id.* at 594-95. The requirement, "by retaining the importance of party affiliation, aids in the parties' electioneering and party-building efforts." *Id.* at 595. The measure also "serves th[e] interest" of preventing "party raiding," which could lead to "party splintering and excessive factionalism." *Id.* at 596. In sum, this Court held that the Oklahoma measure was constitutional

not only because the burden it imposed was not severe, but also because the measure was reasonably tailored to achieve important state interests. As the Court noted: "While the State's interest will not justify unreasonably exclusionary restrictions, we have repeatedly upheld reasonable, politically neutral regulations. . . ." *Id.* at 597 (internal quotations and citations omitted).

In other cases in which this Court has held that an election law imposed something less than a severe burden on voters, candidates, or others, it still has required the state to demonstrate that the law is reasonably tailored to the state interests and nondiscriminatory. *See Burdick*, 504 U.S. at 439-40 (holding that Hawaii's ban on write-in voting imposed only a "limited burden on voters' rights" and that the law was tailored to the state's interests in avoiding "unrestrained factionalism" and "party raiding"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363-64 (1997) (Minnesota's ban on fusion candidacies imposes a burden that was neither "trivial" nor "severe;" Court held the fusion ban was tailored to several state interests including ensuring that support for minor parties is genuine, promoting a strong two-party system, and preventing ballots that are merely "billboards for political advertising"); *Storer*, 415 U.S. at 736 (California's law requiring independent candidates to have disaffiliated from a political party at least a year before running for office was tailored to state's interest in avoiding "splintered parties and unrestrained factionalism"); *Rosario*, 410 U.S. at

761-62 (New York law requiring voters in party primary to register with party by certain deadline was "*tied to* [the] particularized legitimate purpose" of preventing party raiding) (emphasis added).[3]

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[3] Of course, in cases in which this Court has held there is a severe burden imposed by an election law, the Court looks for the law to be even more tailored to the state's interests. *See, e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (striking down various Colorado laws regulating the circulation of initiative petitions on grounds that the measures imposed serious burdens on constitutional rights and were not narrowly tailored to the state's interests in administrative efficiency, fraud detection, or informing voters); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio statute requiring independent presidential candidates to file statement of candidacy and nominating petition in March to appear on November general election ballot because the law severely burdened voters' rights and was not justified by state interests in voter education, equal treatment of candidates, or political stability). *Amicus* believes that all of the cases since *Storer* in which this Court has found less than a severe burden involved ballot access issues or questions involving who may vote in partisan primaries, not voting rights issues as the case at bar.

In one of those ballot access cases, *Munro v. Socialist Workers Party*, this Court held that it would not always require proof of evidence justifying such a law, reasoning that "[s]uch a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." 479 U.S. 189, 195 (1986). "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.* *Munro*'s principle is sensibly limited to ballot access cases, *id.*, in which the state's assertion of a connection between its interest in an orderly ballot process and the means chosen by the state to achieve that interest is neither novel nor implausible. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial

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Some lower courts too have recognized the need for a state to demonstrate tailoring under a *Burdick* analysis even when the burden imposed on voters is not severe. *See, e.g., Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (*en banc*); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995); *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991).

This requirement that the state show some tailoring *in all cases* burdening voters' First and Fourteenth Amendment rights is *not* the application of a strict scrutiny/compelling interest/narrow tailoring

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scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.")

Munro's analysis does not apply to this case for two reasons. First, this is a voting rights case implicating the fundamental right to cast a ballot that counts. *See Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (applying strict scrutiny to state durational residency requirement for voter registration); *U.S. v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state *to cast their ballots and have them counted* at Congressional elections.") (emphasis added). In contrast, the ballot access cases concern the more minor harm caused when candidates without serious voter support are deprived of an opportunity to appear on the general election ballot. Second, even if *Munro* applied to voting rights cases, Indiana's assertion that a voter identification card is necessary to prevent election fraud is both novel and implausible. *See* Section III.B., *infra*. In short, using the lexicon of *Munro* itself, Indiana's law is not "reasonable" and "significantly impinge[s] on constitutionally protected rights." *Munro*, 479 U.S. at 195.

test in all election law cases. That standard would inappropriately burden every election administration provision. *See Clingman*, 544 U.S. at 593 ("To deem ordinary and widespread burdens like [the ones at issue in *Clingman*] severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes."). Indeed, when courts apply the reasonable tailoring requirement, most challenges to garden-variety state or local election laws will fail. *See Storer*, 415 U.S. at 730 ("It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases").

For example, consider a state's decision to consolidate some polling places for cost-saving reasons. The first question the court should address is whether the consolidation imposes a severe burden on voters. If it does, strict scrutiny applies. But a modest consolidation of polling places will not impose a severe burden on voters. The next question would be whether the law is reasonably tailored to achieve cost savings and is nondiscriminatory. Assuming the consolidation indeed saves the jurisdiction money and does not disproportionately burden particularly affiliated voters or groups of voters, these elements would be satisfied. Finally, the court would balance the state's interest in cost savings with the burden on voters of the moved polling places. The court would then likely uphold a modest consolidation as a reasonable, nondiscriminatory election law.

The requirement that the state show some tailoring is a necessary means of ferreting out partisan-oriented election laws passed with only the pretext of satisfying a government interest. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) ("First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.").[4] Thus, if a state

[4] An alternative to requiring some proof of tailoring even in cases of less severe burdens is for courts to apply heightened scrutiny in the face of evidence that a legislative body has passed an election law with an intent to favor one party over that of another. This approach was favored by the Seventh Circuit judges dissenting from denial of rehearing *en banc* in the Court below. *Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing *en banc*) ("when there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny. Only this exacting approach will suffice to ensure that state law is not being used to deny these citizens their fundamental right to vote"). *See also Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., joined by Breyer, J., concurring) (stating that election laws sometimes may be enacted for partisan purposes, and if such laws burden voters severely and have discriminatory effects, courts should apply heightened scrutiny). It is also favored by some commentators. *See, e.g.*, Christopher Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PENN. L. REV. ___ (2007) (*draft available at* http://ssrn.com/abstract=980079) (draft at 69); *Recent Cases, Constitutional Law—Voting Rights—Seventh Circuit Upholds Voter ID Statute*, 120 HARV. L. REV. 1980, 1985-87 (2007); *cf.* Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L.

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consolidated polling places nominally for its cost savings but did so *only in Republican or Latino neighborhoods,* the law would fail *Burdick* scrutiny even if the burden on voters in those areas to travel a little farther would not be "severe." Such a law simply would not be reasonably tailored to cost savings and would be discriminatory.

Under *Burdick*, in cases in which an election law is not reasonably tailored it cannot survive challenge even if the burden on voters is not severe. Enforcing this Court's requirement that there be reasonable tailoring will separate those laws enacted for purely partisan purposes with no legitimate public purpose from laws that impose some burdens on voters but are in fact tailored to further justifiable interests of the government.

REV. 28, 137-138 (2004). Though this approach likely would lead to the same result in this case as the application of reasonable tailoring, the effort to ferret out bad legislative intent may be difficult in particular cases, making closer means-ends scrutiny a superior approach. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 877-79, 888-90 (2006).

III. THE LOWER COURT'S DECISION SHOULD BE REVERSED BECAUSE INDIANA'S LAW BURDENS POOR VOTERS AND OTHERS WITHOUT IDENTIFICATION, AND BECAUSE IT DOES NOT FURTHER THE STATE'S INTEREST IN PREVENTING ELECTION FRAUD.

The lower court's decision in this case should be reversed for two reasons. First, Indiana's voter identification law poses a severe burden on poor voters and others who lack voter identification. Second, even if the law did not impose a severe burden, there was no evidence to conclude that the voter identification law prevents election fraud, and therefore the law is not tailored to further that state interest.

A. The Indiana Voter Identification Law is Burdensome and Therefore Subject to Heightened Scrutiny.

On the first point, Indiana's voter identification law, the strictest in the nation, provides that voters who do not have identification may cast a provisional ballot at the polls. An indigent voter then would have to make a second trip sometimes as far as 30 minutes or more away at the voter's own expense to the county seat to file an affidavit of indigency. *See* Hasen, *Untimely Death*, at 24, 39 n.190. Such a requirement is a formidable barrier to voting by the

indigent.[5] The law also imposes a severe burden on poor voters who are not so poor as to qualify as indigent. First, poor voters will need to purchase the documents (such as a certified copy of a birth certificate) necessary in order to obtain the required voter identification card. Second, if such voters do not have their identification with them at the polls, they would have to make a second trip at their own expense to a county seat (as opposed to returning to the polling place) to provide proof of identity. This requirement surely will discourage voting by poor and indigent voters, not to mention others who neglect to bring their identification to the polls. Moreover, as discussed above, the cases in which this Court has found less than a severe burden involved ballot access cases or cases involving whether non-party members can vote in partisan primaries, and are not voting rights cases such as this one.

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[5] The court below made much of the fact that the plaintiffs did not include Indiana voters who lack identification. But the court did have before it Professor Hershey's study regarding how many Indiana voters are likely to have problems with the identification requirement. (Joint Appendix 96-134, 292-98.) Moreover, the lower court acknowledged that the law was likely to burden Democrats more than Republicans, *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007), a concession that would make no sense if in fact no voters were burdened by the identification requirement.

B. The Indiana Voter Identification Law is Not Tailored to the Interest in Preventing Election Fraud.

Even if the law did not impose a severe burden on voters, the law still fails for lack of any tailoring. There is no question that preventing election fraud is a compelling state interest. *Purcell*, 127 S.Ct. at 7. Such an interest could well justify a fairly applied voter identification law.[6] But it cannot support Indiana's strict new law. Indiana conceded it had never prosecuted a case of *impersonation* voter fraud that a voter identification law would be likely to prevent. *Crawford*, 472 F.3d at 955 (Evans, J., dissenting). Nor was there any credible evidence inside or outside the record that impersonation voter fraud is a serious problem in this country, or that requiring indigent voters to make two trips at their own expense to government offices to cast a valid ballot would serve to prevent such fraud.

The Court of Appeals wrote as follows of the failure of the state to produce any evidence of voter fraud in this case:

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[6] Such a law would have to provide easy means for voters to obtain the identification, including a provision either for a fair indigency exemption or for the state to pay the costs for indigent voters to obtain the documentation necessary to obtain the voter identification card. Such a law also would need to provide for alternative proof of identity for those who reasonably cannot produce a birth certificate. Other exemptions, such as religious exemptions, may be necessary as well for the provision to survive constitutional scrutiny.

> But that lacuna may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate. Some voter impersonation has been found (though not much, for remember that it is difficult to detect) in the states that have been studied, and those states do not appear to be on average more "dishonest" than Indiana; for besides the notorious examples of Florida and Illinois, they include Michigan, Missouri, and Washington (state). Indirect evidence of such fraud, or at least of an acute danger of such fraud, in Indiana is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote.

Crawford, 472 F.3d at 953.

The Court of Appeals provided no citations of evidence of "notorious" voter impersonation fraud in Florida, Illinois, Michigan, Missouri, or Washington State.[7] This is not surprising, given that the evidence

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[7] Nor was the district court's treatment of this issue any better. The district court cited to fourteen exhibits from the state to reach the conclusion that voter fraud was a major national problem. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 793-94 (S.D. Ind. 2006). Yet virtually all of that evidence was anecdotal, unproven (and in some cases disproved), or related to a kind of fraud, such as absentee ballot fraud, that Indiana's voter identification law would do nothing to deter. *See* Brief of Brennan Center for Justice at NYU Law School as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 6-18, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir.

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2007) (No. 06-2218) (analyzing and refuting each piece of evidence cited by the district court in support of its holding on the prevalence of impersonation voter fraud).

The Seventh Circuit majority's discussion of absentee voting is equally unconvincing. The court wrote:

> The plaintiffs complain that the new Indiana law is underinclusive because it fails to require absentee voters to present photo IDs. But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo.

Crawford, 472 F.3d at 953. The court did not consider the possibility of a law requiring absentee voters to provide a copy of their state driver's license (or other state ID) number, or thumbprint with their vote, which could be compared (perhaps on a random basis in an audit) to a thumbprint on file, or some other means of verifying their identity. Moreover, the problem with absentee voter fraud is not impersonation vote fraud, but the sale of votes. *See* Hasen, *Untimely Death*, at 22; *see also* U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FURTHER STUDY App. 3, at 5 (2006) [hereinafter, U.S. EAC, ELECTION CRIMES] (*available at* http://www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf) (Indiana's assistant attorney general Douglas Webber told EAC interviewers that absentee balloting presented the greatest problem with vote fraud in the state of Indiana). Under anything stronger than rational basis review, it would be hard for the state to justify its decision to make voting more difficult in the name of fraud protection for those voters who vote with a system less prone to fraud, while leaving the system with more fraud completely alone. *Cf. Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment) ("a law cannot be regarded as protecting an interest of the

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does not exist. A *New York Times* analysis of efforts of the Justice Department over five years to find and prosecute cases of voter fraud nationally revealed only 86 successful prosecutions and no systematic evidence of the kind of impersonation voter fraud that would support the need for a voter identification law.[8] Indeed, many of the prosecutions appeared to be based upon innocent mistakes by voters, and not intentional fraud. Of the 70 successful federal prosecutions nationally from 2002 to 2005, only 26 involved voters (the rest involved election officials or party or campaign workers), and apparently none of the convictions were for illegal activities that a voter identification system likely would prevent.[9] At the

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highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal quotations and citation omitted); *Republican Party of Minn. v. White*, 536 U.S. 765, 779-80 (2002) (the existence of gaping holes in regulatory scheme indicate law is not tailored to interests put forward by state).

[8] Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A3 ("A handful of convictions involved people who voted twice. More than 30 were linked to small vote-buying schemes in which candidates generally in sheriff's or judge's races paid voters for their support.").

[9] *See* Hasen, *Untimely Death*, at 22 n.109. The United States Election Assistance Commission, created by Congress in the wake of the 2000 Florida debacle and charged with providing advice on sound election administration, so far has produced nothing to substantiate claims of anything more than a trivial amount of polling place fraud. It issued a report in 2006 finding the fraud issue unsettled. U.S. EAC, ELECTION CRIMES, at 1. The U.S. EAC was criticized for not endorsing the preliminary findings of its hired consultants, which found polling place fraud was not a major problem. *See* Hasen, *Untimely Death*, at 24-25.

same time, the government has been able to find and successfully prosecute numerous instances of absentee vote fraud and vote buying, which presumably election criminals would take equal steps to cover up.[10]

Because Indiana failed to present any evidence that the provision at issue is reasonably tied to the purpose of addressing election fraud, the law should be struck down as a violation of the Equal Protection Clause and the First Amendment right of association whether or not the court concludes the burden the law imposes on voters is "severe." Moreover, that burden—severe or not—disproportionately falls on certain groups of voters for the reasons discussed above, and therefore fails to meet the nondiscriminatory requirement as well.

IV. THIS COURT SHOULD CLARIFY CONFUSING *DICTA* IN *PURCELL V. GONZALEZ* REGARDING VOTER FEELINGS OF DISENFRANCHISEMENT RESULTING FROM ELECTION FRAUD.

Last term, this Court in *Purcell v. Gonzalez* issued a brief *per curiam* opinion in a case involving

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[10] That there would be more absentee voter fraud than impersonation voter fraud is unsurprising, given the difficulties of enforcing vote buying deals for voting occurring at polling places with a secret ballot. *See* Richard L. Hasen, *Introduction, Symposium, Internet Voting and Democracy*, 34 LOYOLA L.A. L. REV. 979, 982 (2001) (noting that institution of the secret ballot may have reduced bribery).

Arizona's voter identification law. 127 S. Ct. 5. *Dicta* in this decision has further confused lower courts about how to engage in *Burdick* balancing. This Court should use this case as an opportunity to clarify the *dicta*.

In *Purcell*, Plaintiffs challenged the law as unconstitutional and a violation of the Voting Rights Act, and sought a stay of the law's enforcement pending a trial on the merits. *Id.* at 6. The district court denied the request for a stay, but a motions panel of the United States Court of Appeals for the Ninth Circuit reversed that order, issuing an interlocutory injunction enjoining application of the law in an impending election. *Id.* The State of Arizona then sought a stay of the Ninth Circuit's order from Justice Kennedy as Circuit Justice. *Id.* at 5. Justice Kennedy referred the motion to the Court, which treated it as a petition for *certiorari*, granted the petition, and, without full briefing or oral argument, issued an opinion on the merits. *Id.*

This Court held that the Ninth Circuit erred in failing to give deference "as a procedural matter" to the district court's discretion on the stay. *Id.* at 7. The Court of Appeals compounded its error by failing to give reasons for issuing its stay order and by changing the rules for conducting the election so close to Election Day." *Id.*

In issuing its unanimous opinion, this Court stressed that it was not deciding anything on the

merits on connection with voter identification challenges:

> We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's [October] 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and [n]o bright line separates permissible election-related regulation from unconstitutional infringements. Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.

Id. at 8 (internal quotations and citation omitted; second alteration in original). However, in *dicta* this Court also stated,

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Countering the State's compelling interest in preventing voter fraud

> is the plaintiffs' strong interest in exercising the "fundamental political right" to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (internal quotation marks omitted).

Id. at 7.

The lower court in the case at bar treated that *dicta* as requiring courts to balance the *actual* disenfranchisement costs of voter identification laws with *feelings* of disenfranchisement that could come from voter perception of voter fraud. *See Crawford*, 472 F.3d at 952 (citing *Purcell* for the proposition that "[a] strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger"); *see also Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1381 (N.D. Ga. 2007) (quoting *Purcell dicta* and implying that the state has a compelling interest in preventing *feelings* of disenfranchisement that could come from voter perception of voter fraud).

This Court should reaffirm that it did not hold in *Purcell* that lower courts must balance a feeling of disenfranchisement among voters in ruling on the constitutionality of voter identification laws. The discussion of feelings of disenfranchisement served merely to explain one of the reasons that voter fraud can be harmful *in theory*. In the case at bar, the state of Indiana did not prove that anxiety about real or imagined impersonation voter fraud exists *in fact*. To the extent that voter fraud anxiety were to be considered as a separate factor in any *Burdick* balancing analysis, the state would need to provide actual

evidence of the degree—if any—to which fear of voter fraud depressed voter turnout. No such evidence was presented here. And there surely would have to be evidence that a proposed remedy for voter fraud, whether or not it actually alleviated the fraud, served to reduce the perception of the extent of the fraud. There is no support for that in the case of voter identification provisions.[11] *See* Hasen, *Untimely Death*, at 35-36.

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[11] Even if there were evidence that fears of voter fraud depressed turnout, there are strong arguments that the balance should be struck against upholding a voter identification law justified solely on the basis of preventing the *feeling* of disenfranchisement. As the Missouri Supreme Court observed in rejecting this argument:

> While the State does have an interest in combating those perceptions, where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement. Perceptions are malleable. While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.

Weinschenk v. State, 203 S.W.3d 201, 218 (Mo. 2006); *see also* Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 765 (2007) ("The Court's equation [in *Purcell*] of state denial of the right to vote with voters' *private* decisions not to participate in a process in which they lack confidence represents a breathtaking expansion of the concept of vote dilution.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand the case for entry of judgment in plaintiffs' favor.

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AMICUS CURIAE BRIEF

Nos. 07-21, 07-25

In The Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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STATEMENT OF INTEREST

This *amici curiae* brief in support of Petitioners is filed on behalf of historians and other scholars, twenty-nine in all, who for many years have studied issues concerning voting rights.[1]

The present case raises important questions about the right to vote and the governmental interests that must be present in order for the state to impose restrictions on that right. *Amici* have a long-standing, demonstrated interest in the integrity of elections and the protection of citizens' right to vote and to participate in the political process. Their interest is directly involved in this case.

SUMMARY OF ARGUMENT

The issue before the Court is whether a law[2] passed by the Indiana legislature requiring most voters to show a photo ID in order to cast a ballot violates the First and Fourteenth Amendments of the U.S. Constitution. Plaintiffs challenging the law in

[1] These *amici curiae* are listed in Appendix A. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part. A monetary contribution to the preparation and submission of this brief was made by the Center for Voting Rights and Protection. The parties have filed letters consenting to the filing of any *amicus curiae* brief with the Clerk of the Court.

[2] Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005 (hereafter, "Indiana photo ID law").

the district court argued that the burdens imposed by the new law work an unfair and unjustified hardship on many people who do not have an Indiana driver's license or other official documents that count as a legitimate photo ID. They argued, *inter alia*, that the photo ID requirement imposes real costs involved in obtaining the right kind of photo ID, costs that unduly burden many eligible citizens in the exercise of their right to participate in the political process. A majority of the appeals court below disagreed with plaintiffs, minimizing the burden imposed and stating that it was justified by the goal of preventing voter fraud, even while admitting that no instance of in-person fraud had been prosecuted in the history of the state.

To scholars of voting rights and election law in the United States, this case raises extremely important questions that the Court would do well to consider in reaching its decision. Given the long history of legally sanctioned disfranchisement of large and disparate groups of Americans from the founding of the Republic to the very recent past, the signatories of this brief – primarily historians and social scientists who have studied disfranchisement – respectfully urge the Court to consider the likelihood that the Indiana law is yet another effort in this tradition, even though it is justified in public debate by laudable goals that fair-minded citizens might well agree with.

This *amici* brief will chronicle this nation's history of disfranchising people of color and poor

whites under the banner of "reform," reviewing disfranchising devices such as secret ballot laws, registration acts, "eight-box" laws, and literacy tests. Such measures were offered under the "reform" banner and billed as anti-fraud or anti-corruption devices; yet through detailed provisions within them, they produced a discriminatory effect (often intended) within the particular historical context. Special attention will be paid to the poll tax, which is often cited as the historical antecedent of the current photo ID laws, and which similarly placed a disproportionate and unconstitutional burden on those with limited resources, particularly racial and ethnic minorities. *See infra* Sections I-III.

The brief will also analyze whether Indiana's photo ID law falls within this unfortunate American tradition of disfranchising laws passed under the guise of electoral reform. *Amici* propose a multi-factor framework for assessing whether a given election law is based on illicit legislative motives notwithstanding a declared "good government" purpose, considering, for example, the law's historical background and actual or foreseeable impact. *See infra* Section IV. In examining the Indiana law within this framework, *amici* focus on whether the law was enacted to advance partisan goals and whether the alleged objectives of the law – deterring in-person voter fraud and ensuring electoral integrity – are credible. After reviewing the partisan nature of the legislative support for the Indiana law and the partisan affiliation of the groups most likely to be burdened by the

law, as well as noting the absence of any convictions in Indiana relating to the type of voter fraud the photo ID law purports to prevent, *amici* conclude that the motives behind the law are particularly suspect. *See infra* Sections V-VI.

In sum, analysis of Indiana's law in light of this country's history of disfranchisement reveals that the photo ID requirement, like the now unconstitutional poll tax, has not been justified by the "reform" objectives asserted by its proponents. The historians and other scholars who are signatories to this *amici* brief therefore urge this Court to reverse the Seventh Circuit decision below, and prevent a repetition of this country's shameful history of suppressing the vote of its most vulnerable citizens.

ARGUMENT

I. Post-Reconstruction "Progressive Reform" Was Typically Used To Disfranchise People of Color and Poor Whites

No era in American history provides more dramatic examples of this kind of dishonesty and its costs to democracy than the half-century following the Civil War.[3] The language of "progressive reform" was extensively employed in the late nineteenth- and

[3] For a summary of this period, see JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS, Chap. XIII (Fortieth Anniversary ed. 1988).

early twentieth-century campaigns to disfranchise blacks and poor whites in the South. Actually adopted for partisan and racially discriminatory purposes, and having dramatic partisan and racially discriminatory effects, these laws were often presented as high-minded attacks on fraud – efforts to "purify" the electorate that would only inconvenience "vote sellers" or the ignorant and "shiftless."

To be sure, unlike today, when proponents of voter identification must strain to find the smallest examples of fraud, particularly among those voting in person at the polls, in the nineteenth century there was widespread and readily admitted fraud – *against* African Americans and the Republican party to which they then adhered. Louisiana Senator Samuel D. McEnery stated in 1898 that his state's 1882 election law "was intended to make it the duty of the governor to treat the law as a formality and count in the Democrats."[4] William A. Anderson, author of the 1894 racially discriminatory election law in Virginia, boasted that elections under his law were "crimes against popular government and treason against liberty."[5] A leader of the 1890 Mississippi constitutional convention admitted that "it is no secret that there has not been a full vote and a fair count in Mississippi since 1875," which was the last year until

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[4] *New Orleans Daily Picayune*, Feb. 30, 1898.

[5] Herman L. Horn, The Growth and Development of the Democratic Party in Virginia Since 1890, 47-48 (1949) (unpublished Ph.D. dissertation, Duke Univ.).

1967 in which African Americans voted at all freely in the state.[6] In other words, there were many examples of the disfranchisers speaking openly about their intentions.

Nonetheless, these same white supremacist Democrats invoked the language of reform in calling for a wide range of restrictions on the suffrage: "eight-box" laws, registration acts, secret ballot laws, poll taxes, literacy and property tests, "understanding" qualifications, and white primaries.

Nowhere did the aura of reform hang so heavily as around the secret or "Australian" ballot, a measure with much to recommend it, in America as elsewhere. Endorsed by the radical English Chartists of the 1840s, American labor leaders, popular reformers like Henry George, and the Populist Party, as well as civic reformers such as Congressman (later Senator) Henry Cabot Lodge, the secret ballot swept across the country after the extremely close and highly controversial presidential election of 1888.[7] (Ironically, that controversy centered on allegations of fraudulent voting in Indiana.) Reformers declared that the secret ballot would diminish corruption and bring the "best men" into politics. Eight southern and thirty

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[6] VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI 206 (1947).

[7] J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 51 (1974).

non-southern states adopted the secret ballot between 1888 and 1900.[8]

Advertised as a general anti-fraud measure, just as photo identification measures are today, the nineteenth century secret-ballot laws could be designed, through their detailed provisions, to act as stringent literacy tests. If voters were prohibited from receiving assistance in voting from friends or acquaintances or even from election officials (as in many southern and eight non-southern states), if party labels were prohibited (as in Florida, Louisiana, and Tennessee), if the ballot was exceedingly long (as in Louisiana's 1898 ticket, which contained 92 names, listed alphabetically, for 36 constitutional convention delegate positions), or if the ballot was printed in German *Fractur* script (as in one congressional district in Virginia in 1894), then voters had not only to be literate, but also quite skillful in English.[9] In seven of the eleven ex-Confederate states in 1900, over half of the African-American male adults were illiterate,[10] and in the nation as a whole, about a sixth of white male adults had been born in a non-English-speaking

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[8] SPENCER D. ALBRIGHT, THE AMERICAN BALLOT 23-29 (American Council on Public Affairs, 1942).

[9] Details about these laws and ballots are taken from KOUSSER, *supra* note 7, at 51-53, 161 and 164.

[10] In the antebellum South, it was illegal to teach a slave to read, and postbellum schools for African Americans were often starved of funds.

country. Clever *de facto* literacy tests could disfranchise many people.

And they did. An 1892 Democratic campaign song in Arkansas put the point most memorably:

> The Australian Ballot works like a charm,
> It makes them think and scratch,
> And when a Negro gets a ballot
> He has certainly got his match.[11]

Estimated black turnout in Arkansas dropped from 71 percent before passage of the secret-ballot law to 38 percent in the first election after passage; in Louisiana, from 69 to 24 percent; in Tennessee, from 60 percent to little or nothing.[12] The effects were partisan, as well as racial. In Tennessee, according to the Democratic *Memphis Daily Appeal*, the effect of the 1889 Australian ballot law on the 1890 elections was "most admirable. The vote has been cut down wofully [sic] and wonderfully to be sure, but the ratio of Democratic majorities has been raised at least four-fold. . . . The enemy [*i.e.*, the Republican party] is completely annihilated."[13] In short, a reform measure that in important respects was a major step forward in voting technology was purposely used as a disfranchising tool.

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[11] John William Graves, *Negro Disfranchisement in Arkansas*, 26 ARKANSAS HISTORICAL QUARTERLY 212-13 (1967).

[12] These estimates appear in KOUSSER, *supra* note 7, at 55 and 121.

[13] *Memphis Daily Appeal*, Nov. 6, 1890.

As with the Australian ballot, certain registration laws, touted as anti-corruption measures, also had significant disfranchising effects, depending on their detailed provisions and the amount of discretion left to election officials. A North Carolina registration law of 1889, for instance, required the voter to prove "as near as may be" his "age, occupation, place of birth and place of residency . . . by such testimony, under oath, as may be satisfactory to the registrar."[14] African Americans born in slavery often did not know their exact age or place of birth, much less have written proof, if the registrar demanded it. In South Carolina, registrars under the state's 1881 law had the power to add names to the registration rolls after the registration period had closed, enabling them to enfranchise whites, while fencing blacks out of the electorate.[15] Re-registration before critical elections was also used to cut down votes of opponents of the ruling party. In Louisiana, black registration dropped by 90 percent in one year (1898) because of a required re-registration.[16]

Another common disfranchising mechanism involved in the registration process was the "immigrant registration" laws. As one scholar describes them:

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[14] N.C. Acts, ch. 287, §§ 3, 12 (1889), *in* FRENISE A. LOGAN, THE NEGRO IN NORTH CAROLINA, 1876-1894 58-59 (1964).

[15] S.C. Acts § 5, p. 1112 (1881-1882).

[16] La. Constitutional Convention Journal (1898), opposite page 42.

> While alien suffrage was being phased out, numerous states placed new obstacles in the path of immigrant voters: most commonly these were supported by some Republicans, opposed by Democrats, and justified on the grounds that they would reduce fraud. One such obstacle was to require naturalized citizens to present their naturalization papers to election officials before registering or voting. Although not unreasonable on its face, this requirement, as lawmakers knew, was a significant procedural hurdle for many immigrants, who might easily have lost their papers or been unaware of the requirement.[17]

The *New York Herald* in 1888 described as "a sad feature" of New Jersey's immigrant registration requirement the fact "that many persons will be deprived of their vote, as their papers are either worn out, lost, or mislaid."[18] Moreover, as historian Alexander Keyssar notes, this requirement, along with the provision allowing anyone present at the polls to challenge immigrant voters' credentials, gave "substantial discretionary power" to officials at the polls.[19]

South Carolina in 1881 instituted the "eight-box" law, requiring different ballots to be deposited in separate ballot boxes for each of the eight offices to be

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[17] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 138 (2000).

[18] *Ibid.*

[19] *Ibid.*

voted on. The purported purpose was to prevent illiterate voters from taking to the polls already marked ballots given them by political bosses and simply depositing them, perhaps in return for money. Since the order of the ballot boxes was supposed to be shifted periodically throughout Election Day, fraud by illiterates would be impossible. The law, however, served as a literacy test, and the fact that election officials, who in South Carolina after 1876 were all Democrats, could "assist" illiterates in placing their ballots in the correct boxes indicates the partisan and racial purposes of the nationally famous scheme.[20] Along with a registration law passed at the same time, the eight-box law cut black turnout from 70 percent to 35 percent and finished the chances of the South Carolina Republican party in statewide elections until the 1960s.[21]

Between 1889 and 1913, nine states outside the South made the ability to read English a prerequisite for voting.[22] Literacy tests were said to reduce the influence of immigrants or African Americans who supported "bosses" and "demagogues."[23] Writing in

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[20] For details of the law, its passage, and its purposes, *see* KOUSSER, *supra* note 7, at 84-91.

[21] *Ibid.* at 92, Table 4.4.

[22] John B. Phillips, *Educational Qualifications of Voters*, UNIVERSITY OF COLORADO STUDIES (1906); ALBERT J. MCCULLOCH, SUFFRAGE AND ITS PROBLEMS 54-58 (1929).

[23] J.J. McCook, *Venal Voting: Methods and Remedies*, 14 THE FORUM 171-76 (1892); JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA 183, 195 (1920).

the reformist *North American Review*, a University of Michigan geologist denounced "the communistic principle of universal and equal suffrage."[24] Disfranchising those who lacked "the highest qualification of intelligence and virtue is not injustice to those who surrender control; it is justice to those who have a right to the best government; it is justice to those whom nature and education have fitted to administer the best government."[25] Between 1890 and 1908, seven of the eleven ex-Confederate states adopted state constitutional amendments allowing only literate voters or those with a certain amount of property to vote, sometimes with loopholes like "understanding" qualifications or grandfather clauses that allowed some whites to vote who could not meet literacy or property tests. Shortly after the passage of these amendments, fewer than 10 percent of African Americans managed to register to vote in most states, and no more than 15 percent in any.[26]

This, then, is an all-too-brief summary of the pattern of post-Reconstruction disfranchising laws, exclusive of the poll tax, as they have been chronicled by numerous twentieth-century historians: the brutal curtailment of the voting rights of people of color and, in many cases, poor or immigrant whites as well. Much of the disfranchisement was racist in origin; but some

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[24] Alexander Winchell, *The Experiment of Universal Suffrage*, 136 NORTH AMERICAN REVIEW 119-34 (1883).

[25] *Ibid.*

[26] KOUSSER, *supra* note 7, at 60-61.

merely saw political opportunity in disfranchising a vulnerable segment of the population. Sometimes these laws were justified forthrightly in partisan terms, sometimes they were rationalized by appealing to the standards of democracy, electoral reform, fairness, and "purity" of the ballot. Moreover, sometimes the laws were clever variations on unexceptionable principles that violated the voting rights of targeted groups.

II. The Poll Tax Was Likewise Used from the 1890s to the 1960s to Disfranchise People of Color and Poor Whites

The current debate over the wisdom and legality of the Indiana photo ID requirement as a prerequisite to voting – as well as similar laws in other states – has led to claims that it is a "modern-day poll tax," implying that the new law, too, falls within the ignominious American tradition of disfranchising laws passed under the guise of "good government" reform.

The poll tax has a long history in the United States, but it took on a new meaning after Reconstruction: "where it once had referred to a head tax that every man had to pay and that sometimes could be used to satisfy a taxpaying requirement for voting, it came to be understood as a tax that one had to pay in order to vote," writes Keyssar.[27] After Reconstruction,

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[27] On the shift in purpose of the tax, *see* KEYSSAR, *supra* note 17, at 112.

the tax was used as a political weapon, targeting especially blacks and poor whites.[28] Sometimes, as with other disfranchising weapons, those favoring it were straightforward in describing their goals.[29] Sometimes, like proponents of other disfranchising measures, they tried to mask their motives.

Frederick Ogden, perhaps the foremost scholar of the poll tax, wrote in the 1950s: "While critics of legalized restrictions on Negro voting may find it hard to discover any high moral tone in such activities, these restrictions reflected a movement for purifying the electoral process in southern states."[30] Ogden quotes the editor of the *San Antonio Express* writing in 1902: "By requiring a poll tax receipt, secured six months previous to an election, *fraudulent elections can be prevented almost entirely.*" Almost half a century later, a man who had been a member of the Texas legislature when the poll tax was proposed in 1901 "said the main reason why the legislators approved it was to improve the conduct of elections."[31]

The chief sponsor of the poll tax in Texas, the state's leading "progressive," Alexander Terrell, declared that the purpose of the law was to eliminate

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[28] FREDERICK D. OGDEN, THE POLL TAX IN THE SOUTH 1, 2 (1958).

[29] KEYSSAR, *supra* note 17, at 112.

[30] OGDEN, *supra* note 28, at 7.

[31] *Ibid.* at 10.

"the thriftless, idle and semi-vagrant element of both races. Though liberty requires elections, yet when they are not controlled by intelligence and patriotism they become the most terrible enemy."[32] He enthusiastically promoted disfranchisement as reform, announcing that "Whether universal manhood suffrage is good for the country depends entirely on the sort of men who vote."[33] The Terrell election law of 1903 in Texas cut white turnout from 80 percent in 1900 to 46 percent in 1904 and black turnout from 36 percent to 15 percent in the same elections, and it wiped out the Populists and Republicans.[34]

In summary, the poll tax, like the other disfranchising measures instituted in the same period, clearly was designed to get people who voted "the wrong way" out of the electorate by requiring them to pay enough money to serve as a deterrent, and it had that effect by massively depriving blacks and many poor whites (and, in Texas, Latinos) of their right to vote. As with other disfranchising measures, it was justified in the high-flown language of reform.

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[32] *Austin Daily Statesman*, Oct. 19, 1902.

[33] Charles K. Chamberlain, Alexander Watkins Terrell, Citizen, Statesman, 493-94 (1956) (unpublished Ph.D. thesis, University of Texas).

[34] KOUSSER, *supra* note 7, at 208.

III. The Indiana Photo ID Requirement Imposes Significant Burdens on Voters

How does the burden of the historic poll tax compare to the burden imposed by Indiana's photo ID law? This is not an easy question to answer. The tax differed from state to state. Sometimes party operatives, union members, or employers would pay poll taxes for those whom they thought would vote the right way. Moreover, long-term inflation reduced the actual cost of the tax over the decades, as the nominal cost of the tax remained constant.

At the beginning of the twentieth century, however, the tax was a massive burden on those of lesser means. In Texas, for example, it affected not only the poor in general but also the disproportionately poor black and Latino populations.[35] In 1913, nine years after the $1.75 tax went into effect there ($1.50 was imposed by the state, and counties had the option of imposing an additional 25 cents), it had a buying power of $36.36 in today's dollars.[36] In 1912, the average annual wage in the United States was $592, about $13,000 in today's dollars.[37] It was undoubtedly

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[35] Robert Brischetto, David R. Richards, Chandler Davidson & Bernard Grofman, *Texas*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, 233-37 (Chandler Davidson & Bernard Grofman eds. 1994).

[36] American Institute for Economic Research Cost of Living Calculator, http://www.aier.org/research/col.php (last visited Oct. 23, 2007).

[37] Digital History, http://www.digitalhistory.uh.edu/historyonline/us34.cfm (last visited Oct. 23, 2007). The 1912 figure was $592

(Continued on following page)

less than that in the South, and much less among blacks and Latinos.

By 1966, while still a disproportionate barrier to poor people, the Texas poll tax was nothing like the barrier it had been fifty years earlier. Its price had diminished to roughly $11 in today's dollars.[38] (The tax was not cumulative in Texas, as it was in some states, *i.e.*, one did not have to pay back taxes for the years one had not voted.) Moreover, only voters between the ages of 21 and 60 were required to pay it, and the percentage of people over 60 years of age had increased with time. Other classes of individuals were exempted as well: Indians, the blind, and the permanently disabled, among others.[39] Taken in their entirety, those exempted from the tax shortly before it was abolished in the mid-1960s were estimated to include from 15 to 30 percent of the state's qualified voters.[40] Yet in spite of the greatly diminished weight of this burden between 1904 and 1966, thirty-eight states, in ratifying the Twenty-fourth Amendment in 1964, still saw fit to abolish the poll tax.[41] Furthermore,

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in the source cited, and that figure was translated into 2007 dollars by American Institute for Economic Cost of Living Calculator, *supra* note 37.

[38] *Ibid.*

[39] WILBOURN E. BENTON, TEXAS: ITS GOVERNMENT AND POLITICS 87 (1961).

[40] CLIFTON MCCLESKEY, THE GOVERNMENT AND POLITICS OF TEXAS 52 (2d ed. 1966).

[41] *Ibid.*

two years later, this Court decided *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966),[42] declaring Virginia's poll tax unconstitutional.

How do the decreasing burdens of the poll tax at the time they were abolished or struck down by this Court compare to the burdens shouldered by the citizens of Indiana today as a result of the photo ID law? It requires anyone seeking to vote in person, having already registered, to present special kinds of photographic proof of identity (unless the voter is voting in a state-licensed facility where they reside). Any voter failing to present identification may only cast a provisional ballot. No such proof of identity is necessary for those voting by mail (absentee).

Petitioners Indiana Democratic Party, *et al.* (hereafter "IDP") have noted the burdens imposed by those who choose to vote absentee by mail.[43] They note, for example, that one must apply for a ballot at least eight days before the election, wait for the ballot to arrive, complete the ballot and mail it back in a special envelope, attest by affidavit to the voter's

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[42] While *Harper* focused on the poll tax in Virginia, the Voting Rights Act of 1965 had instructed the U.S. Department of Justice to bring suit challenging the poll tax in state elections, and such a suit was brought in the summer of 1965 in Austin. In February 1966 a three-judge federal panel held the tax requirement violated the Fourteenth Amendment, even before the Supreme Court made the same finding in Virginia. See McCLESKEY, *supra* note 41, at 53.

[43] *See* IDP Brief at 5-6.

identity, and mail it back so that it arrives by noon on Election Day.[44] No photo ID is required for any part of this absentee ballot process.[45] These requirements of an absentee voter (all of which can be undertaken without a photo ID), are entirely different from the burdens imposed on voters who plan to vote in person on Election Day but who lack the required photo ID.

For the latter, the task of casting a ballot that will be counted can be challenging. There are two options available to such persons: 1) They can attempt to get suitable photo ID before Election Day; or 2) they can cast a provisional ballot on Election Day and then, within ten days of the election, verify their identity.

The most typical photo ID consists either of an Indiana driver's license or a state-issued ID card.[46] At least 43,000 persons of voting age in Indiana are estimated to have neither.[47] For the larger number of persons who do not have a driver's license, getting one will probably be a difficult route.

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[44] *Ibid.*

[45] *Ibid.* at 6. The one exception is the Help America Vote Act (HAVA), which requires that first-time voters in a federal election who register by mail must provide "a copy of a current and valid photo identification" or a "copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." 42 U.S.C. § 15483(b)(2)(A).

[46] Petitioner IDP Brief, at 13.

[47] Petitioner Crawford Brief at 12.

The second route, on its face, seems easier, as a state-issued ID card is nominally free. But consider the steps that a potential voter must take to secure such an ID. First, he or she must appear at the Bureau of Motor Vehicles (BMV) and present one of two sets of documents. The first set includes a "primary document," a "secondary document," *and* "proof of Indiana residency." The second alternative set consists of two "primary documents" and one "proof of Indiana residency."[48] Primary documents include a birth certificate of a specified kind, certain documents certifying American citizenship, a passport, or a U.S. military or merchant marine photo ID.[49] Included among secondary documents are bank statements, court documents, certified academic transcripts, and government-issued ID cards.[50] A number of documents are also accepted as proof of Indiana residency.[51] While such requirements might seem reasonable in the abstract, the record in this case shows that approximately 60 percent of the applicants for a photo ID are turned away by the Indiana BMV for lack of the required documents.[52]

For those would-be voters who show up at the polls without sufficient photo ID, the new law requires

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[48] Crawford Petition for Writ of Certiorari Appendix ("Pet. App.") at 31a-35a.

[49] *Ibid.* at 32a-33a.

[50] *Ibid.* at 33a-34a.

[51] *Ibid.* at 35a.

[52] Andrews Dep. 28-29, *cited in* Petitioner IDP Brief at 13.

that they be challenged, even if they are known by the poll officials.[53] They must then vote using a provisional ballot – a not too promising avenue, given that 85 percent of provisional ballots cast in Indiana in 2004 were not counted, and that was before the new photo ID law had gone into effect.[54] To cast such a ballot, voters must sign an affidavit stating under penalty of perjury that they are eligible to vote in that precinct. Nine different factual statements must be attested to in the affidavit.[55]

With the new law in effect, voters who cast a provisional ballot must, finally, within ten days of the election, travel to the circuit court clerk or the county election board, sign another affidavit swearing they are the person who cast the provisional ballot on election day; and then either show a valid photo ID or swear that they have a religious objection to being photographed or are an indigent unable to obtain proof of identity without paying a fee.[56]

It is evident that this is a significant burden for those who most likely do not possess an Indiana driver's license.[57] The burden for a poor person, an old

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[53] Petitioner IDP Brief at 10.

[54] *Ibid.* at 5.

[55] *Ibid.* at 11.

[56] *Ibid.*

[57] *See* Brennan Center for Justice & Spencer Overton, *Response to the Report of the 2005 Commission on Federal Election Reform* 4-5 (2005), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_47903.pdf.

person, or an old person who is poor, could be quite substantial. In terms of money, for example, in Marion County (Indianapolis) the cost of a birth certificate – one of the documents that can be purchased to establish one's identity – is $10, which, it will be remembered, is approximately the cost in today's dollars ($11) of the poll tax in Texas at the time it was abolished in 1966.

It is often asserted that the barriers of the sort detailed above should not prevent a truly motivated citizen from voting. In a classic article by political scientists Kelley, Ayres, and Bowen attempting to measure determinants of voter turnout, the authors observe:

> A frequent objection to such efforts [to get out the vote] is that voters not interested enough to vote are not apt to vote wisely and so should be left alone. This view recalls the statement of a New York voter regarding the adequacy of the facilities for registering in New York City in 1964: "I sure do want to vote against that man . . . but I don't think I hate him enough to stand on that line all day long." How much interest should a voter have to qualify him for voting? Enough to stand in line all day? For half a day? For two days? We cannot say, but those who think

voting should be limited to the "interested" ought to be prepared to do so.[58]

The question, posed thus in terms of the burden of time alone, can also be posed with regard to money. Particularly concerning the least well off, what sort of monetary impositions should be placed on the right to vote before they become the functional equivalent of a poll tax? This is a question we believe should be carefully weighed by the Court in this case.

IV. Legislative Motives Should Be Considered When Determining the Constitutionality of Any Asserted "Reform"

The problem for this Court, as the Kelley-Ayres-Bowen article quoted above makes clear, is that "electorates are much more the product of political forces than many have appreciated. . . . Within limits, they can be constructed to a size and composition deemed desirable by those in power."[59] Given this Court's important role in protecting the health of our democracy, how can the Court distinguish between unobjectionable, run-of-the-mill regulation and laws designed to restrict partisan participation? What type of analytical framework can be constructed for judges to decide whether a given election law contains illicit

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[58] Stanley Kelley, Jr., Richard Ayres & William G. Bowen, *Registration and Voting: Putting First Things First*, 67 APSR 359, 375 (1967).

[59] *Ibid.*

motives, despite the "good government" reasons presented by its champions?

Happily, manageable doctrinal standards already exist for conducting such an inquiry. This Court has developed a methodological framework in similar cases, such as unconstitutional vote dilution, *see White v. Regester*, 412 U.S. 755 (1973),[60] and Equal Protection Clause cases, *see Village of Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977).

The judicially-created *White-Zimmer* factors, for instance, have helped courts identify illicit motives in districting cases for decades. These factors, drawn from courts' historical experience adjudicating race discrimination claims in the electoral arena, were later adopted by the Senate Judiciary Committee in its 1982 deliberations on extending certain features of the Voting Rights Act. These warning signs, subsequently known as the "Senate factors," have been considered by courts whenever they determine whether election laws violate the Act's proscription against racial discrimination in voting as contained in Section 2 of the Act.[61] These Senate factors were discussed in detail and approved by this Court in *Thornburgh v. Gingles*, 478 U.S. 30, 43-46 (1978).

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[60] The Fifth Circuit enunciated a similar multifactor test for measuring vote dilution in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*).

[61] For the list of factors, *see* S. Rep. No. 97-417, at 28-29 (1982).

This Court's approach for determining racial intent using the *Arlington Heights*-type inquiry is particularly instructive, for it includes many of the same considerations historians and other scholars believe "ought to be taken into account in any inquiry into the intent to which an electoral rule was adopted or maintained, that is, a framework for organizing the totality of the evidence."[62] The *Arlington Heights* factors include: the impact of the law; the historical background; the sequence of events; departures from procedural or substantive norms; and the reasons given for the law (*e.g.*, legislative or administrative history).

While these factors were delineated in the context of analyzing decisions involving race, they address the same type of evidentiary problem at issue in this case – how to identify the true motive behind a decision – and can be easily adapted to situations involving any political minority. Indeed, history teaches that racial and partisan considerations are often intertwined.

Space does not permit a comprehensive and rigorous examination or application of such factors to the Indiana voter ID law in this brief. However, two

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[62] *See, e.g.*, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 346 (1999) (proposing a ten-factor test for analyzing intent of electoral laws, including actual and foreseeable impact, motives of political actors, and statements by proponents).

interrelated factors in particular seem crucial to deciding whether that law should be interpreted solely in the "good government" language of its proponents:

- *First*, will the application of the law shape the Indiana electorate "to a size and composition deemed desirable by those in power," as Kelley, Ayres, and Bowen put it? In the language of *Arlington Heights*, was the photo ID bill approved largely along partisan lines and will its impact most likely harm voters of the minority party (*i.e.*, will it disfranchise likely Democratic voters)?

- *Second*, do the law's mechanisms truly address the stated concerns? In other words, can the supporters of photo ID in Indiana point to examples of voter fraud that will be remedied by the law? Under the *Arlington Heights* framework, the sequence of events that led up to the enactment (*e.g.*, prior prosecutions for in-person vote fraud) and statements made by decisionmakers regarding the law's purpose seem particularly relevant.

These two factors were embraced, respectively, as "an important starting ground" and "highly relevant" by this Court in *Arlington Heights, supra* 429 U.S. at 266, 268. As we show below, there are strong indications that the intent of the Indiana photo ID law is highly partisan, and that the asserted justification of preventing vote fraud lacks credibility.

V. Evidence Strongly Suggests Indiana's Photo ID Law Was Enacted With Partisan Intent To Burden Certain Voters

How does one judge the partisan motives of a bill where the sponsors assert it is designed solely to prevent voter fraud? One method, possibly yielding a suggestive though not definitive answer, would examine the extent to which the bill was passed on a party-line vote. Another would analyze the likely partisan affiliation of those most likely to be burdened by the law. We examine both of these below.

To what extent was the Indiana photo ID bill passed by a partisan vote? It should be noted that Indiana's was one of at least ten bills introduced by Republicans in state legislatures between 2005 and 2007 requiring voters to show a photo ID at the polls. If the house and senate votes for these ten bills are combined, *95.3 percent* of the 1,222 Republicans voting and just *2.1 percent* of the 796 Democrats voting supported the bills. Moreover, in all five cases in which both houses passed them and a Republican was governor, the governor signed them. In the three cases in which both houses passed them and a Democrat was governor, the governor vetoed them. (In two cases, only one house passed the bill.)[63]

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[63] These calculations were based on the recorded votes for the following ten voter ID bills: *Enacted*: H.B. 244 (Ga. 2005) (enjoined); S.B. 84 (Ga. 2006); H.B. 1567 (Fla. 2005); S.B. 483 (Ind. 2005); S.B. 1014 (Mo. 2006) (enjoined). *Failed*: H.B. 2019

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The situation in Indiana was part of this overall pattern, although even more extreme. In the 2005 vote on Senate Bill 483, 85 Republicans supported the bill and none voted against it; 62 Democrats voted against it and none supported it. The Republican governor signed it into law.[64]

Who are most likely to be burdened by the new voter ID laws? A November 2006 survey of 987

(Kan. 2007); H.B. 345 (N.H. 2006); H.B. 1318 (Pa. 2006); H.B. 218 (Tex. 2007); S.B. 42 (Wis. 2005).

Recorded tallies of the legislative votes for these bills are available as follows: Florida, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=17234&SessionId=38; Georgia (2005 bill), http://www.legis.state.ga.us/legis/2005_06/sum/hb244.htm; Georgia (2006 bill), http://www.legis.ga.gov/legis/2005_06/search/sb84.htm; Indiana House vote, http://www.in.gov/legislative/bills/2005/PDF/Hrollcal/0259.PDF.pdf and Senate vote, http://www.in.gov/legislative/bills/2005/PDF/Srollcal/0417.PDF.pdf; Missouri House vote, http://www.house.mo.gov/bills061/jrnpdf/jrn073.pdf#page=23 and Senate vote, http://www.senate.mo.gov/06info/pdf-jrnl/DAY71.pdf#page=117; Kansas House vote, http://www.kslegislature.org/journals/2007/hj0403.pdf and Senate vote, http://www.kslegislature.org/journals/2007/sj0328.pdf; New Hampshire House vote, http://www.gencourt.state.nh.us/ie/rollcall/rollcallsbyvotedetail.asp?sessionyear=2006&voteno=29&body=H and Senate vote, http://www.gencourt.state.nh.us/ie/rollcall/rollcallsbyvotedetail.asp?sessionyear=2006&voteno=66&body=S; Pennsylvania House vote, http://www.legis.state.pa.us/WU01/LI/HJ/2005/0/20060214.pdf and Senate vote, http://www.legis.state.pa.us/WU01/LI/SJ/2005/0/Sj20060215.pdf; Texas House vote, http://tlo2.tlc.state.tx.us/hjrnl/80r/pdf/80RDAY61FINAL.PDF#page=6 and Senate vote, http://tlo2.tlc.state.tx.us/sjrnl/80r/pdf/80RSJ05-15-F.PDF#page=4; Wisconsin House Vote, http://www.legis.state.wi.us/2005/data/votes/av0219.pdf and Senate vote, http://www.legis.state.wi.us/2005/data/votes/sv0123.pdf.

[64] Petitioner IDP Brief at 9.

randomly selected voting-age American citizens by the independent Opinion Research Corporation conducted for the Brennan Center for Justice revealed the following subsets of the population:

- 11 percent of voting-age citizens lacked a government-issued photo ID. Using 2000 census data as a basis, this figure translates into 21 million nationwide.
- 15 percent of voting-age citizens earning less than $35,000 annually lacked such ID.
- 18 percent of citizens 65 years of age or older lacked such ID.
- 25 percent of African-American citizens of voting-age lacked such ID.[65]

The latter two demographic groups, the elderly and African Americans, are more likely to self-identify as Democrats – African Americans overwhelmingly so.[66]

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[65] These figures are statistically significant at the .05 level of confidence. *See* Brennan Center for Justice, *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf.

[66] For African Americans, *see* http://people-press.org/commentary/pdf/95.pdf (last visited Nov. 7, 2007); for senior citizens, *see* http://pewresearch.org/pubs/27/politics-and-the-dotnet-generation (last visited Nov. 1, 2007). Partisan self-identification, of course, is not the sole determinant of one's voting choice. For example, in the 2004 presidential election, 52% of those 65 years and over supported George W. Bush, while 48% supported John Kerry.

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In close elections, the additional burdens placed on both the elderly and African Americans by the photo ID law could benefit Republican candidates. There is no reason to believe this national pattern is much different from that in Indiana.

VI. The Reasons Given for Indiana's Photo ID Law Are Not Credible

Is the ostensible reason given by proponents of the Indiana law (and less stringent photo ID laws in other states) credible? Their claim is that it is designed to prevent in-person vote fraud.[67] The debate over the extent and kind of vote fraud in the United States today has been loud and acerbic at least since the 2000 presidential election and shows no signs of abating. There are numerous kinds of vote fraud and the distinctions among them – which are necessary to determine the most effective means of their prevention – are often lost in popular debate. "Vote fraud" involves chicanery perpetrated both by voters at the polls or elsewhere and by others (including election officials). As critics of the Indiana law correctly point out, a photo ID requirement solely prevents one type of fraud: would-be voters at the polls on Election Day who are not properly registered yet present themselves to election officials as someone who is.[68] Among

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See http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (last visited Nov. 7, 2007).

[67] *See* State Mot. for Summ. J. at 45 (Dec. 1, 2005).

[68] Petitioner IDP Brief at 42-44.

the kinds of voter fraud it does not prevent is that involving mail-in ballots, which some believe to be more common than voters' misrepresenting their identity at the polls.[69]

Another concern of critics of the Indiana law – one that would raise a red flag to historians of disfranchisement as well – is that no apparent effort was made by the legislators pushing the photo ID bill to conduct a study of the kinds and incidence of election fraud in the state before drafting and enacting the bill. A fair and rational approach to revising election laws would include such a study, just as a legislator would conduct a study of the kinds and incidence of environmental pollution in a state before submitting a pollution-control bill.

What makes the statute particularly suspect in the case of Indiana is the fact that there is not a single prosecution for in-person vote fraud in the history of the state – a fact that Judge Posner, author of the court of appeals' split decision below, attributed to lax law enforcement.[70]

Recent experiences in Texas, where Republicans have controlled both branches of the legislature and governorship since 2003, are worth considering in this regard. Statements during the 2004 election season by highly placed officials in the current Washington

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[69] Petitioner IDP Brief at 7 n.3.

[70] Pet. App. 7a-8a.

administration that vote fraud is a national problem, and extraordinary efforts within the U.S. Department of Justice to prosecute vote fraud in the months leading up to that election,[71] increased interest among Texas Republicans in preventing vote fraud in their own state.

During the 2005 session of the legislature, house Republicans in Texas introduced a photo ID bill less restrictive than that in Indiana – other documents could substitute for a photo ID. The Texas house passed the bill in a vote largely along partisan lines.[72] In the senate, the bill was a victim of parliamentary maneuvering by Democrats, and never came up for a vote.[73]

Texas Republicans, however, remained intent on passing such a bill. In the 2007 legislative session, house members again introduced a photo ID bill. Republican legislators did not hide their motives. According to a reporter, "Republicans like the voter

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[71] Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, April 12, 2007, *available at* http://www.nytimes.com/2007/04/12/washington/12fraud.html?_r=1&pagewanted=1&hp&adxnnlx=1176372006-q6OHEvb%20ZBH7i2JW5V76Pw&oref=slogin.

[72] R.G. Ratcliffe, *Multiple ID voting bill wins preliminary OK*, HOUSTON CHRONICLE, May 2, 2005, *available at* http://www.chron.com/disp/story.mpl/metropolitan/3164795.html.

[73] Jim Vertuno, *With filibuster threat in the air, Senate Dems thwart voter ID bill*, HOUSTON CHRONICLE, May 28, 2005, available at http://www.chron.com/disp/story.mpl/politics/3202473.html.

ID bill because they believe it will weaken Democrats, but can argue that it is a reasonable requirement" because it would prevent vote fraud.[74]

Not all Texas Republicans, however, shared that belief. Royal Masset, former political director of the Texas Republican Party, agreed that among his fellow Republicans it was "an article of religious faith that voter fraud is causing us to lose elections." Masset was not convinced. He did believe, however, that requiring photo IDs could cause enough of a drop-off in legitimate Democratic voting to add 3 percent to the Republican vote.[75]

In the debate over the Texas bill, Rep. Betty Brown, its sponsor, alleged that "Voter fraud is a serious crime but without photo IDs . . . the election code is a law without meaning." Democrat Rep. Rafael Anchia responded by saying the bill only addressed "voter impersonation," and cited testimony from officials with the state attorney general's office that no case of voter impersonation fraud had ever been prosecuted. In the final house vote, all but two Republicans supported it. No Democrat did.[76]

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[74] Kristen Mack, *In trying to win, has Dewhurst lost a friend?* HOUSTON CHRONICLE, May 17, 2007, *available at* http://www.chron.com/disp/story.mpl/metropolitan/mack/4814978.html.

[75] *Ibid.*

[76] Karen Brooks, *House Oks Voter ID Bill*, THE DALLAS MORNING NEWS, April 24, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/DN-voterid_24tex.ART.State.Edition2.4369e98.html.

The emotional climax in the fight over the bill during the 2007 session occurred in the senate – consisting of twenty Republicans and eleven Democrats – where a two-thirds vote is required for a bill to be debated. Every Democrat's vote was needed to prevent passage. One Democrat, Mario Gallegos, was in Houston, fighting the rejection of a liver transplant. Against his doctor's wishes, he went to the statehouse in Austin and a hospital bed was installed for him in the capitol for the remainder of the session, if necessary, to enable him to vote if the bill came to the floor. Gallegos thereby prevented its passage, and the bill died.[77]

After the Republicans' first failure to get a photo ID bill through the Texas senate in 2005, Greg Abbott, the Republican Texas attorney general, attracted public attention by announcing a "training initiative to identify, prosecute [and] prevent voter fraud."[78] If the initiative were successful, it would add credibility to his party's call for a photo ID law. This

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[77] *Republicans in Texas: Monkey and Other Business*, THE ECONOMIST, May 31, 2007, *available at* http://www.economist.com/world/na/displaystory.cfm?story_id=9264314. *See also* Mark Lisheron, *Voter ID bill dies for the session, Dewhurst says*, AUSTIN AMERICAN-STATESMAN, May 24, 2007, *available at* http://www.statesman.com/news/content/region/legislature/stories/05/24/24voterid.html.

[78] *See* http://www.oag.state.tx.us/oagnews/release.php?id=1423 (last visited Oct. 25, 2007).

was the most ambitious and costly effort in recent Texas history by the state's top law enforcement officer to come to grips with the alleged problem. "Vote fraud has been an epidemic in Texas for years, but it hasn't been treated like one," Abbott said. "It's time for that to change. Trainers from my office are now across the state visiting with prosecutors and law enforcement officers to stop the problem of voter fraud in its tracks. The integrity of our democratic election process must be protected." The announcement was made on January 25, 2006.[79]

To help quell the "epidemic," Abbott promised that his newly-created Special Investigations Unit (SIU) would "help police departments, sheriff's offices, and district and county attorneys successfully identify, investigate and prosecute various types of voter fraud offences."[80] Established with a $1.5 million grant from the governor's office, the SIU would have as one of its prime responsibilities investigating voter fraud allegations, he said. Abbott targeted 44 of Texas' 254 counties, including "18 cities where the Attorney General has previously investigated or prosecuted alleged Election Code violations that were referred by the Secretary of State." The 44 counties contained 78 percent of registered voters in the state, he said.[81]

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[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

As described by Abbott, the vote fraud training initiative would seem to constitute a model of the aggressive, responsible, multi-level law enforcement effort that Judge Posner below assumed has been lacking in Indiana. What has been the result?

Texas is a large state, with thousands of elections occurring in a four-year period in its numerous governmental units. Texas also has a large population. In 2006, there were 13.1 million persons registered to vote.[82] One study by the anti-immigration group FAIR, estimates that 1.7 million Texas inhabitants reside there illegally in 2007.[83]

Given these facts, one would expect an aggressive, centralized vote-fraud initiative by the state's highest law-enforcement office to result in many prosecutions during the more than twenty-one months of its existence if, in fact, vote fraud had reached "epidemic" proportions. The data presented by the Attorney General on his official Web site tell a different story. Between late January 2006 and late October 2007, 13 persons were mentioned as having been indicted, found guilty, or sentenced for vote fraud, 6 on misdemeanor counts typically involving helping others with mail-in ballots. Of these 13 persons, 4 were accused of having committed fraud

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[82] *See* http://www.sos.state.tx.us/elections/historical/70-92.shtml (last visited Oct. 25, 2007).

[83] FAIR, *Texas: Illegal Aliens*, http://www.fairus.org/site/PageServer?pagename=research_researchab4e (last visited Nov. 2, 2007).

before 2006, and the remaining 9 in 2006. (A total of 4.4 million Texans voted in the general elections for governor or U.S. Senator that year, in addition to those who voted in primaries.)[84] To date, 6 of the 13 persons prosecuted have not yet been found guilty.[85] Moreover, of the 7 found guilty and the 6 remaining under indictment, *none of the types of fraud they have been charged with would have been prevented by the photo ID requirement advocated by Texas Republicans in the 2007 legislative session.*

These data do not appear to be anomalous. A survey of the director or deputy director of all 88 Ohio boards of election in June 2005 found that a total of only 4 votes cast in the state's general elections in 2002 and 2004 (in which over 9 million votes were cast) were judged ineligible and thus likely constituted actual voter fraud.[86] A similar pattern nationwide has been reported.[87]

While it is possible, as Judge Posner implied in his decision, that aggressive vote-fraud enforcement in Indiana might yield more robust results, the

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[84] *See* http://www.sos.state.tx.us/elections/historical/70-92.shtml (last visited Oct. 25, 2007).

[85] These data were obtained from press releases of the Texas Attorney General between Jan. 25, 2006 and Oct. 25, 2007. *See* http://www.oag.state.tx.us/oagnews/ (last visited Oct. 25, 2007).

[86] THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO & THE LEAGUE OF WOMEN VOTERS OF OHIO, LET THE PEOPLE VOTE: A JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO (2005).

[87] Lipton and Urbina, *supra* note 70.

burden should rest on those who allege that vote fraud there is widespread and of the kind that is best deterred by a photo ID requirement. Until that burden is responsibly shouldered by state authorities, the question whether the Indiana law has been justified, in the sense of effectively targeting actual voter fraud, must be answered in the negative. This conclusion, combined with the finding that the legislative vote for the law was strictly along partisan lines and that the people most likely disfranchised by it are Democratic voters, demonstrates that Indiana's law is more in line with American disfranchising traditions, sharing much in common with the now unconstitutional poll tax.

CONCLUSION

We have considered the Indiana photo ID law as a voting prerequisite by revisiting the history of disfranchisement following the Civil War, and by paying special attention to the poll tax at the time it was adopted and at the time it was proscribed. Our considered judgment is that there is an important similarity between the Indiana law and the poll tax: both of them place a disproportionate burden on those of modest means, and the stated reason for the voter ID law is suspect, to say the least.

The ulterior purpose of the law is perhaps not primarily concerned with racial disfranchisement. But the impact of the photo ID bill seems likely to fall on poor and elderly persons, particularly African

Americans. It is therefore worth considering the words of *amicus* herein Richard Valelly who, in his history of "the two Reconstructions," wrote:

> *No* major social group in Western history, other than African Americans, ever entered the electorate of an established democracy and then was extruded by nominally democratic means such as constitutional conventions and ballot referenda, forcing that group to start all over again.[88]

Amicus Valelly does not ignore the checkered histories of democracy in various nations since 1789, including France, "which experienced several [disfranchisements] during the nineteenth century." However, such events in other nations "occurred when the type of regime changed, not under formally democratic conditions. . . . Once previously excluded social groups came into any established democratic system, they stayed in."[89] Valelly also addresses the consequence of this fact for Americans. "The United States is among the last of the advanced democracies to still be at the business of fully including all of its citizens in its electoral politics."[90]

Amicus Vallely is speaking primarily of African Americans. But as this brief has indicated, at numerous points in our nation's history, many groups, and

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[88] RICHARD VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 1-2 (2004) (emphasis added).

[89] *Ibid.* at 2.

[90] *Ibid.* at 249.

especially the least well off, have been targets of disfranchisement, barred from participation in the polity by laws that are justified in the language of "good government." It is our hope that the Court, in examining the facts and the law in this case, and applying the intense scrutiny of the political situation in Indiana that an application of an objective, multi-factor test (*see* pages 24-25, *supra*) entails, will be mindful of the baneful history of disfranchisement in America, and take it appropriately into account in reaching a decision.

For all these reasons, *amici* respectfully urge the Court to reverse the Seventh Circuit decision below.

November 2007

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AMICUS CURIAE BRIEF

Nos. 07-21 and 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, et al.,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, et al.,
Respondents,

&

INDIANA DEMOCRATIC PARTY, et al.,
Petitioners,

v.

TODD ROKITA, INDIANA SECRETARY OF STATE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COMMON CAUSE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, NATIONAL COUNCIL OF JEWISH WOMEN, AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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This *amicus curiae* brief is submitted in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amici are the Lawyers' Committee for Civil Rights Under Law; the Service Employees International Union; the American Federation of State, County, and Municipal Employees; Common Cause, the National Council of Jewish Women; the Jewish Council for Public Affairs; and the American Jewish Committee.[2] These seven organizations have different missions, but each is committed to ensuring that all citizens are able to exercise their right to vote and to combating laws which unduly and needlessly burden many voters' ability to participate effectively in the political process.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote, in other words, "is fundamental 'because preservative of all rights.'" *Harman v. Forssenius*, 380 U.S.

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the brief.

[2] The amici organizations are identified and described individually in the appendix to this brief.

528, 537 (1965) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). The Constitution therefore "leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry*, 376 U.S. at 17-18; *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

The Indiana voter ID requirements at issue here—the most restrictive of their kind in the Nation—unnecessarily, and unjustifiably, abridge the right to vote. The Indiana provisions bar an individual from voting at the polls unless the voter presents a qualifying photo ID. Ind. Code §§ 3-11-8-25.1, 3-5-2-40.5. The photo ID must be issued by the State of Indiana or the United States, it must bear an expiration date that has not elapsed, and it must contain the voter's name in a manner that conforms to the voter's registration record. Ind. Code §§ 3-5-2-40.5(1) – 3-5-2-40.5(4). While a voter who lacks a qualifying photo ID may cast a provisional ballot, the provisional ballot generally will be counted only if the voter—within a period of 10 days—completes the various measures necessary to acquire a qualifying photo ID from the State, and then appears in person before the county election board or circuit court clerk to present the ID. Ind. Code §§ 3-11.7-5-1(b), 3-11.7-5-2.5(a).

The court of appeals, in sustaining Indiana's restrictive photo ID requirements, assumed that virtually all eligible voters would possess a qualifying photo ID. *See* Pet. App. 3, 5-6. And the State went as far as to assert in the proceedings below that "photo identification has become an inevitable fact of American life." Resp. Mem. in Supp. of Mot. for S.J.

9 (filed Nov. 30, 2005). That is both incorrect and irrelevant. As to relevance, the right to vote is "individual and personal in nature," *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), and unjustified burdens on any person's exercise of that right thus infringe the Constitution, whether the affected individuals are few in number or many. As to correctness, it is simply wrong to assume that legitimate voters inevitably possess a photo ID, much less a photo ID that would satisfy Indiana's strict criteria. As *amici* explain in this brief, a significant number—in the range of 10 percent—of voters, for eminently understandable reasons, have had no need or occasion to acquire a government-issued photo ID.

The court of appeals characterized such persons as "people who have not bothered to obtain a photo ID," indicating an assumption that persons without a qualifying photo ID could easily obtain one if they genuinely desired to vote. Pet. App. 3. But for many voters who own no government-issued photo ID, obtaining one would be far from a ministerial task: the process of assembling the requisite documentation and undertaking the other necessary steps involves real burdens and costs, and in certain situations may be nearly impossible to accomplish in adequate time. Nor is it the case, as the court of appeals appeared to suppose, that persons who lack a qualifying photo ID generally "don't bother to" vote in any event. *Id.* In Georgia, for instance, of the roughly 200,000 registered voters who lack any state-issued photo ID, nearly three-quarters voted in the last two election cycles, *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1311 (N.D. Ga. 2006), and over 60 percent voted in the 2004 general election, *see* Sonji

Jacobs & Megan Clarke, *No ID? Votes Cast Can Become Castoffs*, Atl. J. Const., Nov. 2, 2007, at 1A.

The photo ID restrictions at issue, in short, impose material burdens on a significant number of otherwise-eligible voters who genuinely desire to have a voice in the democratic process. And those burdens raise heightened concerns because they fall disproportionately on certain segments of the electorate, including less affluent and minority voters. *See, e.g.*, *Bullock v. Carter*, 405 U.S. 134, 144 (1972). The burdens would be difficult enough to justify even if Indiana's photo ID requirements were closely tailored to advance a substantial governmental interest. But the specific interest advanced in support of the requirements—*viz.*, preventing the heretofore unseen species of fraud that would occur if individuals were to go to the polls seeking to cast a vote in someone else's name—is markedly insubstantial. That asserted interest, under any applicable standard, cannot justify Indiana's uniquely-restrictive photo ID requirements.

Those requirements are so strict that it is more difficult to cast a vote at the polls in Indiana than to clear security when boarding a commercial airplane.[3]

[3] According to the Transportation Security Administration (TSA), passengers must present "accepted forms of ID" if they wish to board a domestic flight without having to go through a more intensive, secondary security screening. Telephone Call placed to TSA General Inquiry Line (Menu Option: "For information on ID requirements"), at (866) 289-9673 (Nov. 9, 2007) (TSA General Inquiry Line); *see also Gilmore v. Gonzales*, 435 F.3d 1125, 1129 (9th Cir. 2006). TSA describes the accepted forms of ID as follows: "Passengers must provide one form of photo identification issued by a local, state, or federal government agency, such as a passport, driver's license, military ID or

Indeed, military veterans in Indiana have been turned away from the polls on the ground that their official photo IDs, although issued by the United States Department of Veterans Affairs, bear no expiration date. *See* Rebecca S. Green, *Refusal of Vets' IDs Leads to Hard Feelings at Polls*, Fort Wayne J. Gazette, May 4, 2006, at 4C. Excessive obstacles to voter participation of that kind are particularly undesirable given that voter turnout in the United States generally continues to decline and already lags behind that of other Western democracies.[4]

This Court has described "[t]he right to vote freely for the candidate of one's choice" as "the essence of a democratic society," and has observed that "any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555. Accordingly, while recognizing that States generally have latitude to govern the electoral process, the Court has consistently invalidated unnecessary restrictions on the ability of an otherwise-qualified voter to cast a ballot. *See Hill v. Stone*, 421 U.S. 289 (1975); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *City*

current student ID. Alternatively, a passenger may produce two forms of non-photo identification, one of which must have been issued by a state or federal agency, such as a birth certificate or Social Security card." TSA General Inquiry Line, *supra*. Those rules, unlike the Indiana voter-ID requirements, encompass both non-photo IDs and photo IDs that contain no expiration date.

[4] *See* Rafael López Pintor et al., Int'l Inst. for Democracy & Electoral Assistance, *Voter Turnout Since 1945: A Global Report* 60, 83-84 (2002), *available at* http://www.idea.int/publications/vt/upload/VT_screenopt_2002.pdf (ranking the United States 138th out of 170 democracies in voter turnout).

of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The Court should do so again here.

ARGUMENT

This Court applies a "flexible standard" when "considering a challenge to a state election law," under which it "weigh[s] 'the character and magnitude of the asserted injury to the rights'" of voters "against 'the precise interests put forward by the State as justifications for the burden.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-359 (1997). If the challenged restrictions impose "severe burdens" on voting rights, they will be invalidated unless narrowly tailored to further a compelling governmental interest. *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434. "Lesser burdens" are subject to a "less exacting"—but by no means toothless—form of review, under which the Court examines whether the challenged restrictions advance a "corresponding interest sufficiently weighty" to justify the associated burdens. *Timmons*, 520 U.S. at 358-359, 364, 369-70; *see Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

Amici agree with petitioners that the burdens occasioned by Indiana's photo ID requirements warrant application of the stricter standard. With respect to the "character" of those burdens, *e.g.*, *Timmons*, 520 U.S. at 358, the Court has distin-

guished direct "condition[s] on the exercise of the right to vote" from more indirect burdens on voting rights (such as laws operating directly against candidates rather than voters), with the former subject to a "more exacting test." *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972). The Indiana photo ID laws impose a direct condition on voters, barring otherwise-eligible voters from casting a ballot unless they produce a qualifying photo ID. It is of no moment that the requirement falls short of an absolute bar, in that a voter could gain eligibility to vote if he were able to acquire a qualifying photo ID. The same is true of poll taxes and property-ownership requirements, both of which likewise establish a condition—*i.e.*, payment of a poll tax or purchase of property—rather than an outright prohibition, and both of which have been invalidated under stringent review. *See id.* at 143 & n.20 (citing decisions). With respect to the "magnitude" of the burden, *Timmons*, 520 U.S. at 358, obtaining a qualifying ID, as we explain below, can be a burdensome, time-consuming, and relatively costly undertaking.

Even the less demanding form of review applicable in the voting context would require invalidation of Indiana's photo ID requirements. That approach calls for assessing whether the "State's asserted regulatory interests" are "sufficiently weighty to justify the limitation" on the right to vote. *Timmons*, 520 U.S. at 364; *see id.* at 358-59, 369-70, taking into consideration "the extent to which the State's concerns make the burden necessary," *id.* at 358; *see also Burdick*, 504 U.S. at 434. *Amici* principally aim in this brief to examine the nature and extent of the

burdens imposed by Indiana's photo ID requirements. But we briefly address at the outset the nature of the governmental interest at stake to enable assessing the "extent to which the State's concerns make the burden necessary," *Timmons*, 520 U.S. at 358, and to demonstrate that those concerns are far from "sufficiently weighty to justify" the photo ID restrictions, *id.* at 358-59.

A. There Is No Need To Impose A Photo-ID Requirement To Deal With The Nonexistent Threat Of In-Person Impersonation Fraud.

As an abstract matter, there undoubtedly is a compelling governmental interest in limiting voter fraud. *E.g.*, *Purcell v. Gonzales*, 127 S. Ct. 5, 8 (2006). But the "precise interest" advanced by the Indiana in support of its photo-ID requirements, *Burdick*, 504 U.S. at 434, is confined to addressing one distinct species of perceived fraud: in-person impersonation fraud, which would occur if an ineligible voter were able to cast a vote at the polls by falsely claiming the name of a registered voter. *See* Pet. App. 7. As the State has acknowledged, there are no reported incidents—not one—of impersonation fraud in the history of Indiana, let alone a prosecution for committing impersonation fraud. *See id.* at 7-8, 11, 39 (Evans, J., dissenting). The experience of other States that have adopted photo ID laws is to the same effect, likewise manifesting the utter absence of any record of in-person impersonation fraud. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1332 (N.D. Ga. 2005); *Weinschenk v. Missouri*, 203 S.W.3d 201, 218 (Mo. 2006). And while the court of appeals suggested, without cita-

tion or support, that "some" instances of in-person impersonation fraud have been found in a handful of other States, Pet. App. 8-9, the court's assertion entirely evaporates upon analysis. *See generally* Brief of Brennan Center as Amicus Curiae in Support of Petitioners.

Indiana's photo ID requirements, in short, are a "solution" in search of a problem. Nor could the photo ID requirements be justified on the theory that, even if there has been no evidence of voter impersonation fraud to date, the State seeks proactively to prevent such fraud from arising in the future. In-person impersonation fraud not only is nonexistent as a matter of fact, it also is virtually inconceivable as a matter of theory.

To begin with, there is no serious possibility that an individual voter, acting alone, would commit impersonation fraud in an effort to alter an election by merely one vote. As to the possibility of a concerted scheme, because of the number of votes necessary to shift the outcome even in a very close election, effective vote fraud requires the ability to manipulate ballots en masse (ideally after the polls have closed when the number of votes needed to affect the result becomes more apparent). That is why vote fraud typically involves schemes in which a few individuals can generate a substantial number of fraudulent votes in a short period of time, such as by stuffing the ballot box or by preparing and submitting fraudulent absentee ballots in bulk. *See* Craig C. Donsanto & Nancy L. Simmons, *Federal Prosecution of Election Crimes* 101 (7th ed. 2007), *available at* http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf. Indiana's photo ID requirements do noth-

ing to prevent those sorts of fraud—indeed, Indiana requires no form of ID documentation for absentee voting apart from a signature, even though the risk of impersonation fraud is far greater with absentee voting than with in-person voting. *See id.* at 31-32.

An orchestrated scheme of in-person impersonation fraud is essentially unimaginable, with or without a photo ID requirement. Such a scheme would require coordinating an army of individual impersonators in order to generate a meaningful number of votes, and each impersonator ostensibly would have to: (i) memorize the name and other identifying information of a registered voter; (ii) learn to mimic the voter's signature; (iii) travel to the appropriate polling precinct site for the particular voter; (iv) wait in line at the polling place to cast a ballot in that voter's name; (v) ensure that the registered voter has not already voted at the polls; and (vi) risk detection by a poll worker who may know the registered voter. Such a scheme would be manifestly unworkable and inefficient as compared with other forms of fraud, requiring an inordinate degree of coordination and effort for each additional vote. And the risks of detection would dwarf the risks associated with other types of vote fraud because of the number of individuals who necessarily would be party to the scheme.

For those reasons, even if Indiana's photo ID requirement imposed only a minimal burden on the right to vote, the burden nonetheless could not be justified by any asserted interest in addressing the non-existent threat of in-person impersonation fraud. In fact, however, Indiana's photo ID law imposes substantial burdens on the right to vote, mak-

ing all the more clear that "the State's asserted regulatory interests" are not "sufficiently weighty to justify the limitation." *Timmons*, 520 U.S. at 364.

B. Indiana's Photo ID Requirements Impose A Material And Disproportionate Burden On The Right To Vote.

1. Millions of otherwise-eligible voters, particularly in certain segments of the electorate, fail to possess a government-issued photo ID.

a. The court of appeals, asserting that "it is exceedingly difficult to maneuver in today's America without a photo ID," Pet. App. 7, operated on the assumption that virtually all legitimate voters would possess a government-issued photo ID. Many voters, however, for fully understandable reasons, own no photo ID of the sort required by Indiana law.

Studies consistently estimate that approximately 10 percent of voting-age citizens in the country—or more than 20 million individuals—lack a government-issued photo ID. *See* Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 73 n.22 (2005) (12 percent of voting-age citizens lack a driver's license); Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006) (*Citizens Without Proof*), *available at* http://www.vote.caltech.edu/VoterID/CitizensWithoutProof.pdf (11 percent of voting-age citizens lack an unexpired government-issued photo ID); Carter-Ford Commission on Election Reform, *To*

Assure Pride and Confidence in the Electoral Process: Task Force Reports to Accompany the Report of the National Commission on Election Reform, No. VI: Verification of Identity (Aug. 2001), *available at* http://www.tcf,org/Publications/ElectionReform/99_full_report.pdf (between 6-11 percent of voting-age citizens lack driver's license or alternate State-issued photo ID).

Research at the state level confirms that a significant portion of the population lacks government-issued ID. In the case of Indiana, a recent survey found that roughly 13 percent of registered Indiana voters lack an Indiana driver's license or an alternate Indiana-issued photo ID. *See* Matt A. Barreto, et al., Washington Institute for the Study of Ethnicity and Race, Working Paper, *The Disproportionate Impact of Indiana Voter ID Requirements On The Electorate*, at Table 1.1b, *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf. Information from other states that have adopted photo ID requirements further confirms that a substantial number of registered voters own no government-issued photo ID. For instance, the Georgia Secretary of State recently estimated that 198,000 registered Georgia voters lack a driver's license or alternate State photo ID. *See* Sonji Jacobs & Megan Clarke, *No ID? Votes Cast Can Become Castoffs*, Atl. J. Const., Nov. 2, 2007, at 1A. The Secretary of State of Arizona estimated that 12 percent of the registered voters in that State—or 375,000 individuals—have no driver's license or State non-operator ID. *See* Report of R. Anthony Sissons at 8, *Gonzalez v. State of Arizona*, No. CV06-1268-PHX-ROS (D. Ariz.), *available at* http://moritzlaw.osu.edu/

electionlaw/litigation/documents/exhibits1924mtnforpreliminjunctionarizona.pdf. And the State of Missouri, in its unsuccessful defense of its photo ID law, found that between 169,000 and 240,000 registered Missouri voters lack a driver's license or alternate State photo ID. *See Weinschenk*, 203 S.W.3d at 206.

Those results reflect the millions of voting-age Americans who do not have access to a motor vehicle and thus normally would have no need to obtain a driver's license, by far the most common form of government-issued photo ID. Census data, for instance, indicates that 10 percent of American households have no available automobile.[5] And while a United States passport would also satisfy Indiana's photo ID requirements, only the relatively small share of citizens who intend to travel abroad would have occasion to obtain a passport. *See* Jane L. Levere, *Scrambling to Get Hold of a Passport*, N.Y. Times, Jan. 23, 2007, at C1 (noting State Department estimate that only 27% of American citizens own a valid passport).

b. The Court has instructed that, in addition to the "magnitude" of the burden occasioned by a restriction on the right to vote, the "character" of the burden is also a material consideration. *E.g.*, *Burdick*, 540 U.S. at 434; *Anderson*, 460 U.S. at 789 (1983). Of particular relevance, restrictions that impose a disproportionate burden on certain segments

[5] U.S. Census Bureau, *Tenure by Vehicles Available by Age of Householder* (2000) (hereinafter *Tenure by Vehicles, Census 2000*), *available at* http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=D&-ds_name=D&-_lang=en&-mt_name=DEC_2000_SF3_U_H045).

of the electorate—including less affluent or minority voters—raise elevated concerns. *See Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring) (noting need for "heightened scrutiny" when electoral restrictions "have discriminatory effects"); *Anderson*, 460 U.S. at 792-93 & n.15; *Bullock*, 405 U.S. at 144 (explaining that restrictions "must be 'closely scrutinized'" because they "fall[] with unequal weight on voters * * * according to their economic status"). Indiana's photo ID requirements raise precisely those sorts of concerns.

i. First, as the court of appeals observed, "[n]o doubt most people who don't have photo ID are low on the economic ladder." Pet. App. 3. Studies confirm that low-income voters are substantially less likely to satisfy voter ID requirements. *See* Matt Barreto, et al., *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters*, Presentation before the 2007 American Political Science Association Conference, Sept. 1, 2007, at 18. For instance, a 2006 nationwide survey concluded that voting-age citizens earning less than $35,000 in annual income were more than twice as likely to lack a government-issued ID as those earning more than $35,000. *Citizens Without Proof*, *supra*, at 3. That outcome is consistent with the fact that low-income voters are less likely to have access to a motor vehicle and hence to require a driver's license. *See, e.g.*, Ind. Dept. of Transp. Market Research Project, *3.0 Environmental Justice Perspectives*, at 3-36, *available at* http://www.in.gov/indot/files/market_section3.pdf (noting that, while over 90% of Indiana households have access to at least one automobile,

one in four below-poverty Indiana households lack access to an automobile).

ii. The incidence of photo-ID ownership also varies significantly based on a voter's race or ethnicity. The same 2006 nationwide study of voting-age citizens found that African-Americans are more than three times as likely as Caucasians to lack a government-issued photo ID, with *one in four* African-Americans owning no such ID. *Citizens Without Proof*, *supra*, at 3.

Information from individual states confirms the racial imbalance. A 2005 study of voting-age citizens in Wisconsin determined that 55% of African-American males and 46% of Hispanic males—as compared with 16% of white males—lack a driver's license (and the corresponding figures for females are 49% of African-Americans, 59% of Latinas, and 17% of whites). John Pawasarat, University of Wisconsin-Milwaukee Employment & Training Institute, *The Driver License Status of the Voting Age Population in Wisconsin* 4-5 (2005), *available at* http://www.uwm.edu/Dept/ETI/barriers/Drivers License.pdf. An examination of registered voters in Georgia similarly found that African-Americans and Latinos were roughly twice as likely as whites to lack a driver's license or other State-issued photo ID. M. V. Hood III & Charles S. Bullock, III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute* 15 (2007).

As is the case with the disproportionate outcomes based on income, the racial imbalance is consistent with underlying patterns concerning access to a motor vehicle. Whereas only 7% of white households

nationwide have no automobile, 24% of black households and 17% of Hispanic households lack an available automobile. *See Tenure by Vehicles, Census 2000, supra.* To the same effect, in Indiana, African Americans make up 6.5% of the total population, but represent 40% of those who commute to work by bus. *See* Ind. Dept. of Transp. Market Research Project, at 3-43.

iii. Photo-ID requirements disproportionately affect both younger and older voters. With respect to older voters, 18% of citizens nationwide who are above the age of 65 lack a current, government-issued photo ID. *Citizens Without Proof, supra*, at 3. A study in Wisconsin likewise determined that roughly 23% of voting-age citizens over 65 lacked a driver's license or other State-issued photo ID. Pawasarat, *supra*, at 4-5. In Georgia, similarly, 25% of registered voters over 65 own no driver's license or Georgia ID card. *Billups*, 439 F. Supp. 2d at 1311. Again, the disproportionate effects reflect disparities in access to motor vehicles: While 10% of all households had no access to a vehicle, 17.5% of over-65 households lacked access to a vehicle. *See Tenure by Vehicles, Census 2000, supra.*

With respect to younger voters, an examination of Federal Highway Administration data concerning citizens aged 18 to 23 found that the share of persons without a driver's license ranged from 32.5% for 18-year-olds to 18% for 23-year-olds. *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 659 (2007). When age and race are considered together, the disparities predictably become more pronounced: in Wisconsin, an astounding *78%* of African-American males (as compared with 36% of white

males) aged 18-24 lack a driver's license, and 66% of African-American females (as compared with 25% of white females) aged 18-24 lack a driver's license. Pawasarat, *supra*, at 5.

2. Obtaining a qualifying photo ID can require a substantial commitment of time and resources.

The significant number of would-be voters who have no qualifying photo ID conceivably could undertake to acquire a government-issued photo ID solely to enable them to vote. Indiana provides for citizens to apply to the Bureau of Motor Vehicles ("BMV") for a photo ID card for non-drivers. Ind. Code § 9-24-16; Pet. App. 2-3. While the BMV charges no fee for issuing the ID card, that does not account for the time and resources required to complete the application process. The Court has emphasized in that regard the need "to examine in a realistic light the extent and nature of [the] impact on voters." *Bullock*, 405 U.S. at 143. The process of obtaining a non-driver photo ID card in Indiana, when considered in a "realistic light," *id.*, can be burdensome, time-consuming, and costly.

a. To apply to the BMV for a non-driver photo ID card (or for a driver's license), a voter would be required to assemble various forms of ID documentation. Any voter born in the United States would need at a minimum to present a certified birth certificate, and would also need to produce other forms of ID documentation such as a bank statement. *See*

Pet. App. 2-3, 31-32.[6] And any certified birth certificate presented for that purpose must be issued by a state or county health department, not a hospital. *See* Indiana BMV website, *Identification Requirements: Acceptable Primary Documents*, http://www.in.gov/bmv/driverlicense/idreq.html#primary (last visited Nov. 11, 2007).

While some voters would have ready access to a certified birth certificate and the other required documents, other voters would not. *See Citizens Without Proof*, *supra*, at 2 (finding that seven percent of voting-age citizens nationwide—or 13 million persons—have no ready access to a birth certificate, passport, or naturalization papers); Center on Budget and Priorities, *Survey Indicates House Bill Could Deny Voting Rights To Millions Of Citizens* (CBP Study), Sept. 22, 2006, *available at* http://www.cbpp.org/9-22-06id.htm (finding that 11 million voting-age citizens possess neither a birth certificate nor a passport).[7] A disproportionate share

[6] Indiana requires an applicant to present at least one "primary document," including a certified birth certificate (or documentation of a birth abroad), a passport, or a military or merchant marine photo ID. Pet. App. 32-33. The latter two cannot be held by the general public, and a passport would entitle the holder to vote in Indiana without any need to obtain a non-driver's photo ID. Accordingly, the only relevant "primary document" for an individual born in the United States is a certified birth certificate.

[7] Significantly, the statistics from those surveys do not differentiate between birth certificates issued by a hospital and certified birth certificates issued by a state or county health department. As a result, those statistics substantially understate the share of voters who would lack ready access to a certified, government-issued birth certificate of the kind required to obtain a State non-driver's photo ID in Indiana.

of lower-income and minority citizens lack easy access to a certified birth certificate and other forms of ID documentation such as a bank statement. *See Citizens Without Proof*, *supra*, at 2 (finding that persons earning less than $25,000 are more than twice as likely to lack a birth certificate, passport, or naturalization documents); CBP Study, *supra* (concluding that low-income and African American citizens are significantly more likely to lack a birth certificate or passport); Barreto, et al., *Voter ID Requirements*, *supra*, at 16 (finding that African-Americans, Latinos, and Asian-Americans are more likely to lack access to a bank statement or utility bill).

Obtaining a certified birth certificate requires payment of a fee. Persons born in Indiana could purchase a certified birth certificate from the State for $10 (or from the relevant county for a fee of up to $10). *See* Pet. App. 37-38. But more than one in four Indiana residents was born in another State. U.S. Census Bureau, 2005 American Community Survey: Indiana, at 1-2, *available at* http://www.census.gov/acs/www/Area%20Sheets/Area%20Sheet%20IN.doc. And the fee to obtain a certified birth certificate from another State can be as much as $45. *See* Overton, *supra*, at 669; *cf. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll tax of $1.50 per voter).

Moreover, the process of obtaining a certified birth certificate can be a time-consuming one. Indiana allows for an average processing time of three to four weeks in response to an application received by mail, not including the mailing time in either direction. *See* Indiana State Dep't of Health, *Where To Get Copies Of Birth Certificates*, http://

www.in.gov/isdh/bdcertifs/birthcert.htm (last visited Nov. 10, 2007). The average processing time is longer in other States. For instance, in the neighboring State of Illinois—where many Indiana residents may have been born—the average processing time is six weeks, again not including mailing time in either direction. *See* Illinois Dep't of Public Health, *Birth Records: Frequently Asked Questions*, http://www.idph.state.il.us/vitalrecords/birth_faq.htm#1 (last visited Nov. 10, 2007). Other States allow for average periods of up to eight to ten weeks. *See Weinschenk*, 203 S.W.3d at 209. The upshot is that an otherwise-eligible voter who lacks a qualifying photo ID may need to begin the process of assembling the required documentation several *months* in advance of the election. *Cf. Dunn*, 405 U.S. at 348 (invalidating requirement that voter have resided in the State for three months before the election as unduly restrictive of the right to vote).

A further complication concerns the ID documentation needed to obtain a certified birth certificate. In particular, a voter who seeks a birth certificate in order to obtain a photo ID could find himself required to present a photo ID in order to obtain the birth certificate. For instance, Marion County, the largest county in Indiana, will issue a certified birth certificate to persons born there only if the application contains the affirmation of a notary that the applicant produced one of the following photo IDs: a driver's license, state ID card, passport, or military ID card. Marion County Health Department, *Application for a Certified Birth Certificate*, http://www.mchd.com/pdf/bthcert.pdf (last visited Nov. 10, 2007). Indiana residents born in the

neighboring States of Illinois and Michigan similarly would be required to present a photo ID to obtain a certified birth certificate from those States.[8] Would-be voters who seek to obtain a qualifying photo ID from Indiana therefore could become trapped in what amounts to an infinite loop of photo ID requirements.

b. A voter who is able to assemble all of the necessary documentation would then be required to bring the documents in person to the BMV. Because the voter by assumption would have no driver's license, she may need to find and pay for transportation to the BMV, and perhaps would need to arrange for taking time off from employment at an hourly wage, or for dependent care, or both—all of which would involve real costs in time and resources. *See Billups*, 406 F. Supp. 2d at 1336 ("For an individual working on an hourly wage, the time it takes to travel to a DMVS (which may be an unreasonable distance away from the resident's home or office), wait in the lengthy lines * * * and then the return commute, results in actual lost wages.").[9] Moreover, the applicant might well need to make more than one trip to the BMV: a BMV employee responsible

[8] Illinois: http://www.idph.state.il.us/vitalrecords/birthinfo.htm (last visited Nov. 10, 2007); Michigan: http://www.michigan.gov/documents/birthapp_6360_7.PDF (last visited Nov. 10, 2007).

[9] While the cost of transportation, considered alone, might seem relatively modest, transportation costs make up a disproportionate share of the day-to-day expenditures of lower-income persons. *See* Ind. Dept. of Transp. Market Research Project, at 3-30 (observing that poor households spend over 40% of take-home pay on transportation).

for determining whether photo ID applicants have assembled the appropriate documentation estimated that she turns away roughly 60% of applicants because they have not brought the correct documentation. *See* J.A. 215, 220-221 (Andrews Dep.).

Consider, in that regard, the case of Therese Clemente, a 78-year-old registered Indiana voter who has no driver's license and who sought to obtain a qualifying photo ID upon learning of the new photo ID requirements. She made an initial trip to the BMV to apply for a qualifying ID and brought with her multiple forms of ID, including a Social Security card, utility bill, property tax bill, credit card, and voter registration card. She was told, however, that she would need to bring a birth certificate. She then went home, retrieved her birth certificate, and returned to the BMV, only to be informed that her birth certificate failed to qualify because it was not a certified copy. She subsequently mailed an application for a certified birth certificate to Massachusetts, where she was born, and paid the associated $28 fee. After receiving a certified birth certificate two weeks later, she returned to the BMV a third time. But on this occasion, she was again rebuffed on the ground that her certified birth certificate contained her maiden name rather than her married name, which is not at all an uncommon situation. *See Citizens Without Proof*, *supra*, at 2 (finding that 52% of voting-age women with access to a birth certificate lack a birth certificate with their current legal name). She was therefore instructed that she would need to return to the BMV a fourth time, this time with a

certified copy of her marriage certificate. J.A. 93-94.[10]

c. The cumulative burdens associated with the process of obtaining a qualifying photo ID, in short, can be quite substantial.[11] By way of comparison, this Court, in *Harman v. Forssenius*, 380 U.S. 528 (1965), considered a constitutional challenge to a Virginia law that required voters, as a condition of eligibility to vote in federal elections, either to pay a poll tax or to file (including by mail) a notarized certificate of Virginia residence. *See id.* at 529-30 & n.1. The certificate of residence consisted of a sworn statement by the voter of his or her address, and did not require the voter to prepare or assemble any additional documentation. *See id.* at 541.

The Court explained that the poll tax, if it were an absolute prerequisite to voter eligibility, would

[10] A person who has a certified birth certificate might have difficulty satisfying other documentary requirements. For instance, Indiana requires documentary proof of residency to obtain a photo ID card. *See* Pet. App. 3. The record contains the statement of a homeless person who went to the BMV armed with his birth certificate and social security card, but who was denied a photo ID card because—as a homeless person—he could not present proof of an address. J.A. 67. Homeless persons frequently encounter obstacles of that variety when seeking to obtain a government-issued ID. *See* National Law Center on Homelessness and Poverty, *Photo Identification Barriers Faced by Homeless Persons: The Impact of September 11* (2004), *available at* http://www.nlchp.org/content/pubs/Photo%20ID%20Barriers1.pdf.

[11] *See generally Billups*, 406 F. Supp. 2d at 1341-1342 (reviewing declarations of numerous would-be voters in Georgia describing various difficulties associated with process of obtaining a state-issued photo ID).

violate the Twenty-Fourth Amendment. *Id.* at 540. The Court then considered whether the Virginia law nonetheless could be sustained on the ground that the State afforded the option of filing the certificate in lieu of paying the poll tax. In concluding that the availability of that option failed to save the law, the Court explained that filing the certificate constituted a "material requirement" and involved what the Court considered to be "plainly a cumbersome process." *Id.* at 540-41. It necessarily follows that the process of obtaining a photo ID from the Indiana BMV—even in the case of voters for whom the process runs most smoothly—at the very least constitutes a "plainly cumbersome procedure."

3. The availability of a provisional ballot does not effectively alleviate the burden on voters who lack a qualifying photo ID.

If an Indiana voter arrives at the polls without a qualifying photo ID, Indiana law provides for the voter to cast a provisional ballot. Ind. Code § 3-11-8-25. To have the provisional ballot counted, the voter must appear before the circuit court clerk or county election board within a period of 10 days, at which time the voter must either: (i) present a qualifying photo ID; or (ii) execute an affidavit affirming that the voter is "indigent." Ind. Code § 3-11.7-5-2.5.[12] Neither of those alternatives meaningfully alleviates

[12] The voter also can execute an affidavit swearing that he or she has a religious objection to being photographed for a photo ID. Ind. Code § 3-11.7-5-2.5(c)(2)(B).

the burden on voters who possess no qualifying photo ID.

a. The first option—that of obtaining a government-issued photo ID and presenting it to the circuit court clerk or county election board within 10 days—is of little practical use to a voter who lacks a qualifying ID. Even assuming that the voter had ready access to the necessary documentation, including a certified birth certificate, he would first need to bring the documents to the BMV to make an in-person application for a photo ID card. And even further assuming that he was among the 40% of persons who manage successfully to obtain a photo ID card in their first visit to the BMV, *see* p. 22, *supra*, he would then need to make a separate trip to the county seat to present the ID to the circuit court clerk or county election board. Because the voter by assumption would not drive an automobile, he would be required to arrange for (and potentially pay for) two separate trips to two distinct locations during normal working hours, with especially the latter trip to the county seat potentially requiring travel to a relatively distant location. *Cf.* Ind. Const., art. 15, § 7 (establishing that no Indiana county can be created that is less than 400 square miles in area). Accomplishing all of that within a 10-day period would be, to say the least, a tall order.

If the voter lacks access to a certified birth certificate, it would be nearly impossible to complete the necessary steps within the 10-day window. Because the only way to obtain a birth certificate within that period of time would be to make an in-person application, *see* pp. 19-20, *supra*, the voter would be required to make arrangements for a third

trip, this time to the relevant State or county government office to obtain a certified birth certificate. If the voter were born in a county or State other than where he currently resides, arranging for a trip to his county or State of birth would itself require a substantial expenditure of time and resources. And the voter would still be faced with a trip to the BMV (to apply in-person for an ID) and a trip to the county seat (to present the ID). For those reasons, a voter who casts a provisional ballot because he lacks a qualifying photo ID would have no realistic opportunity to obtain one and present it to the circuit court clerk or county election board within the 10-day period.

b. The option of returning to the county seat and filing an affidavit of indigence is likewise ineffectual. As an initial matter, that option by its own terms is of no use to the many voters who lack a government-issued photo ID, but who could not qualify—or who would not swear to qualifying—as "indigent." Indeed, the statute nowhere defines the term "indigent," but nonetheless requires the voter to swear under penalty of perjury that he is "indigent." Ind. Code § 3-11.7-5-2.5(c)(2)(A)(i). Especially because indigence is far from a self-defining concept, no well-advised voter would swear that he is "indigent" in the absence of any definition of the term.[13]

[13] The indigence provision also contains another notable ambiguity. A voter must swear not only that he is "indigent," but also that he is "unable to obtain proof of identification without the payment of a fee." Ind. Code § 3-11.7-5-2.5(c)(2)(A)(ii). But because Indiana does not charge a fee for issuing a non-driver's photo ID card, it is not at all clear how the voter can swear that he is unable to obtain the ID "without

Even if the terms and scope of the indigence provision were more clear, the provision would be substantially flawed in its operation. Because there is no allowance for carrying over an indigence affidavit from one election to the next, a voter would be required to cast a provisional ballot, and then to make a separate trip to the county seat to execute an indigence affidavit, in *every* primary and general election. Indeed, it is far from clear why a second trip is necessary even in any one election. Indiana could substantially reduce the burden on voters—with little apparent cost to the State—by making indigence affidavits available at the polling place on election day instead of requiring the voter to make a separate trip to the county seat to execute the affidavit. *Cf. Carrington v. Rash*, 380 U.S. 89, 92 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State").[11]

the payment of a fee." Insofar as the statute means to address costs associated with the application process other than the fee for the ID itself (*e.g.*, travel costs, costs of obtaining a certified birth certificate), the statute is self-evidently ambiguous on the point. In any event, it provides no basis by which a voter could determine which such costs should be considered—much less any basis that would be clear enough to enable the voter to make an affirmation under penalty of perjury.

[11] Although Indiana's photo ID requirements do not extend to voting by absentee ballot, absentee voting is available only to particular categories of voters. *See* Ind. Code § 3-11-10-24. Accordingly, absentee voting does not constitute a general exception to the photo ID requirements. Even with respect to those categories of voters—such as the elderly or disabled—who are entitled to vote by absentee ballot, Ind. Code §§ 3-11-10-24(a)(4) - 3-11-10-24(a)(5), the availability of that option does not relieve the State of its obligation to justify imposing the photo ID

4. Indiana could readily achieve its objectives through a variety of less burdensome means.

Indiana's photo-ID requirements are the most restrictive voter ID provisions in the Nation. The majority of States do not require voters to produce documentary evidence of their identity at the polls. *See* Overton, *supra*, at 640. Those States instead employ non-documentary means of assuring the voter's identity, such as by matching the voter's signature to the corresponding one in the registration rolls or by requiring the voter to sign an affidavit affirming his identity under penalty of perjury. *Id.* Several other States request documentary proof of ID, but permit a voter who fails to bring ID documentation to the polls to establish his identity by other means, such as by signing an affidavit. *Id.* at 640-41. A number of additional States allow non-photo ID documents such as a utility bill or bank statement. *Id.* at 641; *see also* Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1712 (codified at 42 U.S.C. § 15483(b)(2)(A)) (requiring first-time voters to present documentary proof of ID, including utility bills, bank statements, paychecks, and other forms of non-photo ID).[15]

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requirements on those voters who would prefer to vote at the polls.

[15] Arizona requires Election Day voters to show one form of government-issued photo identification or two forms of non-photo identification from a specified list. Unlike Indiana, Arizona requires that the identification have the voter's current address. Ariz. Rev. Stat. § 16-579 (2007).

Six States require a voter, at least in the first instance, to produce a photo ID. In three of those States—Louisiana, Michigan, and South Dakota—a voter who does not own a qualifying photo ID nonetheless can vote upon executing an affidavit affirming his identity. *See* Pet. Br., No. 07-21, at 30-31 n.14. Florida also permits a voter who fails to possess a qualifying photo ID to cast a ballot, which will be counted if the State determines that his signature matches the signature on the voter's registration forms. *Id.* That leaves only two States—Indiana and Georgia—that enforce an absolute requirement to produce a qualifying photo ID. Georgia, however, accepts a broader range of photo IDs than Indiana. *See Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1347 (N.D. Ga. 2007).[16]

Indiana's decision to adopt the most restrictive voter ID requirements in the Nation should substantially inform the Court's consideration of "the extent to which the State's concerns make the burden necessary," *Timmons*, 520 U.S. at 358. As *amici* have explained, *see* pp. 8-11, *supra*, there is no need for Indiana to adopt highly-restrictive photo ID requirements to address what a mounts to a nonexistent threat of in-person impersonation fraud. Indiana could substantially reduce the burdens on voters

[16] For example, a voter can obtain a voter ID card in Georgia by going to the registrar's office and providing identification. Ga. Code § 21-2-417.1(e) (2007). Given that a voter's registration application is among the acceptable forms of identification that can be used to obtain a voter ID card, *see* 504 F. Supp. 2d at 1347, the Georgia law does not in fact prevent voter impersonation but merely raises an administrative hurdle for voters who lack a government-issued photo ID.

by adopting less restrictive ID measures of the kind used by other States. That is particularly the case because Indiana already employs the less-restrictive means of a signature match with respect to absentee voting. And if a signature match suffices for absentee voting—where the risk of impersonation fraud is much higher—there could be no sound reason to require anything more burdensome for in-person voting at the polls.[17]

In the alternative, Indiana, like other States, could enable a voter who lacks a government-issued photo ID to execute an affidavit affirming his identity, with associated criminal penalties for falsely claiming the identity of another person. *See Dunn*, 405 U.S. at 353-54 (invalidating durational residency requirement because "Tennessee has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared"). Those sorts of measures have proven more than adequate in other States to prevent in-person impersonation fraud. While Indiana

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[17] The court of appeals hypothesized that Indiana applies a signature match for absentee ballots because there would be no feasible method of imposing a photo ID requirement on absentee voters. *See* Pet. App. 9-10. That is incorrect. The State could require that absentee ballots be delivered in person in advance of Election Day, and could require that the voter present a qualifying photo ID when submitting the absentee ballot. Alternatively, the State could require that an absentee voter obtain the signature of a notary affirming that the voter proved his identity by presenting a qualifying photo ID. That, for instance, is precisely how Marion County, Indiana, enforces its requirement that an applicant present a government-issued photo ID when applying by mail for a certified birth certificate. *See* pp. 20-21, *supra*.

therefore may have at its disposal a variety of less restrictive measures of the kind in effect in other States, what Indiana cannot do is to continue to enforce the most burdensome voter ID requirements in the Nation ostensibly to address a species of fraud virtually unseen in the Nation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX
STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Through the Lawyers' Committee, thousands of attorneys have represented thousands of clients in civil rights cases across the country challenging discrimination in virtually all aspects of American life.

The Lawyers' Committee has decades of experience litigating individual and class action voting rights claims in federal and state courts, and is highly knowledgeable about the legal and policy issues relevant to this case. The Lawyers' Committee is counsel for certain plaintiffs in a federal statutory and constitutional challenge to an Arizona law that requires citizens to provide proof of citizenship when they register to vote and identification when they vote in person. *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006), *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). The Lawyers' Committee has also been counsel for plaintiffs in the federal statutory and constitutional challenges to government-issued voter photo identification laws enacted by Georgia in 2005 and 2006. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), 439 F. Supp. 2d 1294 (N.D. Ga. 2006), 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

With the cooperation of other voting rights advocates, the Lawyers' Committee has systematically tracked legislation dealing with photo IDs and provided legal analysis on legislation that would impede equal participation by all in the political process, particularly legislation imposing photo ID requirements.

Service Employees International Union ("SEIU") is a tax-exempt, non-profit labor organization that has 1.9 million members throughout the United States, including the state of Indiana. The SEIU represents workers in a variety of occupations and industries including property services, health care, and in the public sector. Many of our members are individuals of color who work in low-wage occupations such as janitors, security guards, home care aids, and nursing home workers. Our work as the leading advocates for improving the lives of low-wage workers has entailed encouraging worker involvement in public life through voting and engaging in the political process.

Many SEIU members and members of their families encounter substantial obstacles to obtaining government-issued photo identification, which they must present to vote at the polls under the Indiana law at issue. The SEIU holds an interest in participating in this case to ensure that its members and their families can freely exercise their right to vote.

The American Federation of State, County and Municipal Employees ("AFSCME") is the largest union for public service workers in the United States, with 1.4 million members nationwide, including 5,200 in Indiana. Throughout its seventy-five year

history, AFSCME has promoted civic participation among its members, declaring in the preamble to its Constitution that "[f]or unions, the work place and the polling place are inseparable, and the exercise of the awesome rights and responsibilities of citizenship is equally required at both." The availability and exercise of the elective franchise to and by its members is central to AFSCME's objective of advancing the welfare of those members through organizing, collective bargaining and legislative and political action.

Common Cause is a nonprofit, nonpartisan citizens organization with approximately 300,000 members and supporters nationwide. With active members and staff in Indiana, Common Cause's mission is to ensure open, accountable, and effective government at the federal, state, and local level. Government can only be accountable to the people if its election process accurately reflects the will of the electorate. Common Cause has a longstanding concern that barriers to voting presented by Indiana's photo ID law could cause a distortion in election results by depressing turnout disproportionately among some demographic groups and make elections less accurate as a result. Common Cause has been active in opposing efforts to erect unnecessary barriers to voting in many states, including Georgia where we were a plaintiff in challenging a similar photo ID provision.

The National Council of Jewish Women ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its net-

work of 90,000 members, supporters, and volunteers nationwide. The National Council of Jewish Women works to ensure and advance individual and civil rights. NCJW's Resolutions state that the organization endorses and resolves to work for "fair voting laws, policies, and practices to ensure easy access to the electoral process and that every vote counts." Consistent with our priorities and resolution, NCJW joins this brief.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 14 national Jewish organizations and 125 local Jewish federations and community relations councils. Since its founding in 1944, JCPA has worked to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just, democratic, and pluralistic society. The JCPA recognizes our security is inexorably linked to the strength of democratic institutions. JCPA believes that the Jewish community has a direct stake—along with an ethical imperative—in assuring that America remains a country wedded to the Bill of Rights and committed to the rule of law, a nation whose institutions continue to function as a public trust.

The American Jewish Committee ("AJC"), a national organization of over 175,000 members, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. A staunch defender of voting rights for all citizens, AJC joins in this brief in declaring unconstitutional a state law that requires voters to present government issued photo identification at the polls.

AMICUS CURIAE BRIEF

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41 pgs

Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

No. 07-21

WILLIAM CRAWFORD, ET. AL.,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, ET AL.

Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, ET AL.,

Petitioners,

v.

TODD ROKITA, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR LAWYERS DEMOCRACY FUND AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Lawyers Democracy Fund,[2] a non-profit, tax exempt organization under section 501(c)(4) of the Internal Revenue Code, has as its mission to promote fair and honest elections, free of coercion, intimidation and fraud. Lawyers Democracy Fund seeks to assure that all citizens are able to exercise their right to vote and that reasonable, common sense anti-fraud protections be enacted to prevention dilution of each person's honest vote.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit panel below confirmed the common sense rationale for Indiana's Voter ID requirement. Citing the 2005 Carter-Baker Commission Report, the panel observed that today, no person in the United States can board an airline, enter a government building, or purchase liquor or cigarettes, without providing photo identification. Voting is one of the core elements of our American freedoms, and the right to vote is precious. Yet the historic record of vote fraud in America is clear. Attempts to steal the vote, and thus steal a measure

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

[2] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members or its counsel contributed monetarily to this brief.

of each honest citizen's franchise, are neither imagined, nor implausible. Unfortunately, a long list of such attempts can be compiled since the turn of this century just seven years ago.

Article I § 4 of the Constitutional vests the States with power to enact procedural requirements for elections, including the power to prevent vote fraud. The Court views such requirements with deference unless they impose a "severe burden" on the right to vote.

The Voter ID law does not impose a severe burden on the right to vote. On the contrary, by reducing vote fraud, it preserves the right to vote. An eligible voter whose ballot is nullified by an illegal vote has been disenfranchised just as much as an eligible voter who cannot cast a ballot.

More than 99% of Indiana voters already have photo ID and possession of such documentation is necessary to exercise numerous other constitutional rights, such as the right to file suit in federal court or to travel aboard commercial aircraft. Petitioners have not identified a single person whom photo ID would prevent from voting and the district court excluded their statistical evidence as "utterly incredible."

Indigent persons or persons with religious objections to photo ID may cast a provisional ballot, which will be counted if they file an affidavit to that effect within ten days after the election. Non-indigent persons can obtain the documents necessary to obtain photo id by exercising a minimal amount of foresight and initiative. This is no

more burdensome than the requirement to register to vote before the election.

If the Voter ID requirement creates a severe burden, it is hard to imagine any rule requiring voter identification that would pass muster.

More than half the states have enacted voter ID laws, and the Court should allow those experiments in democracy to continue.

There is no question that vote fraud is, in some places, a serious problem. The bipartisan Baker-Carter Commission concluded that there is "no doubt" that voter fraud and multiple voting take place and "could affect the outcome of a close election." The 1600 fraudulent ballots cast in the 2004 Washington gubernatorial elections substantially exceeded the 129 vote plurality of the winner, but the result stood because no one knew who the beneficiary of the fraud was.

Perhaps the most telling evidence however, is that Petitioners were unable to identify a single person injured by the law. This problem also confronted challengers to Georgia's and New Mexico's Voter ID statutes, as well as Arizona's citizen ID statute. These cognizable facts before the Court lead to only one conclusion. This reasonable, non-discriminatory voting requirement is akin to advance voter registration requirements, and subject to limited constitutional scrutiny.

ARGUMENT

I. NONE OF THE PETITIONERS IN THIS CASE HAVE STANDING TO PURSUE THE CLAIMS IN THIS LITIGATION

A. Article III Standing and Case or Controversy

The opponents of photo identification laws in this case find themselves facing the same stunning omission that every lawsuit challenging photo identification requirements up to this point has faced—no individual or group has standing to challenge the law in question. Opponents again fail to identify a single voter that is actually harmed by the provisions of any photo identification for voting requirement. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 783 (2006); *see also Common Cause/Georgia v. Billups*, 504 F.Supp.2d 1333, 1374, 1380 (N. D. Ga. 2007).

Although the Seventh Circuit addressed the issue of standing very succinctly, Article III standing is the " 'irreducible' constitutional minimum" that must be satisfied when a party brings a claim in federal court. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In order to assert a claim under federal jurisdiction, a plaintiff must show that (1) he or she has suffered an actual or threatened injury (an "injury in fact"), (2) the injury is fairly traceable to the challenged conduct of the defendant, and (3) the injury is likely to be redressed by a favorable ruling. *Id.* at 498-99.

Petitioners in this case are unable to demonstrate even the first element of standing, because there is no entity or individual that has suffered an injury in fact. In order to show an injury in fact, a plaintiff must show an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted).

Because of the lack of any individuals or entities that are harmed, if the Court reaches the merits of this case, there is no evidence in the record, or elsewhere, that it will actually grant relief to anyone. Indiana and Georgia first passed laws requiring photo identification for in-person voting in 2005. Ind. Public Law No. 109-2005; 2005 Ga. Laws, Act 53. Since that time, the plaintiff organizations opposing these laws politically and legally have failed to identify any individual who has actually had his or her right to vote violated by requiring photo identification for in-person voting. *Common Cause/Georgia*, 504 F.Supp.2d at 1374, 1380; *Rokita*, 458 F.Supp.2d at 783.

Petitioners can be divided into two distinct groups: (1) the organizational plaintiffs, including the Indiana Democratic Party, which are asserting claims on behalf of their members or in their own right; and (2) the individuals who are asserting individual and representative claims, including the state legislators. Each group lacks standing in this case.

B. The Organizational Plaintiffs Lack Standing to Assert Any Claims

1. The Democratic Party and other organizations cannot represent claims of their members in this case

Only under limited circumstances may organizations represent claims of their members. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000). In order for an organization to pursue an action on behalf of its members, the organization must show at least one member who has standing in their own right. *Id.* Like the plaintiffs in Georgia, the organizational plaintiffs in this case, including the Indiana Democratic Party, fail to locate a single member of any organization that has standing to sue. *Rokita*, 458 F.Supp.2d at 817 ("None of the Organization Plaintiffs has identified a single member who does not already possess the required photo identification and has an injury beyond 'mere offense' at having to present photo identification in order to vote which, as we have said, does not confer standing."); *see also Common Cause/Georgia*, 504 F.Supp.2d at 1380. As discussed below, the requirement of photo identification does not result in a denial of equal protection, and thus the district court's determination that the Democratic Party can assert claims on behalf of its members is incorrect. *Rokita*, 458 F.Supp.2d at 813-814. Thus, the organizational plaintiffs do not have standing to sue on behalf of their members.

2. The organizational plaintiffs cannot assert claims in their own right

The Seventh Circuit found that the Indiana Democratic Party had standing to pursue the claims outlined in the complaint independently, then quickly moved to the merits of the case. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951-952 (7th Cir. 2007). The Seventh Circuit relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), to establish that the Indiana Democratic Party suffered an injury in fact, because the Indiana Democratic Party claims it would devote resources it would not otherwise spend to get its supporters to the polls if the state enforced the photo identification requirement. *Crawford*, 472 F.3d at 951. However, the assertion that the Indiana Democratic Party would reallocate resources is only that—an assertion. The Indiana Democratic Party has not demonstrated that it actually reallocated any of its resources, nor are there any facts, beyond vague assertions, to suggest that it plans to do so. *Rokita*, 458 F.Supp.2d at 816.

This Court should not stretch *Havens* to reach the same conclusion as the Seventh Circuit. In *Havens*, this Court found an organization had standing because counteracting the discriminatory housing practices of the defendants resulted in the organization devoting significant resources away from its core mission. *Havens*, 455 U.S. at 379. *Havens* is distinguishable because here, as opposed to the context of the discriminatory housing practices, an injury in fact cannot be clearly demonstrated. Resources the Indiana Democratic Party would expend for elections with or without the photo identification requirement relate to the exact same mission: getting Democratic voters to the polls.

Unlike the situation in *Havens*, where the organization had to devote specific resources away from its core mission, the method by which the Indiana Democratic Party performs or encourages its activities does not detract from its core mission. *Id.*

In addition, the organization in *Havens* had *already* expended significant resources to counteract the defendants' policies, *id.*, while the Indiana Democratic Party has expended nothing outside of its legal fees, only saying it will devote some funds to the subject in the future. *Rokita*, 458 F.Supp.2d at 816. The district court in *Common Cause/Georgia* refused to extend *Havens* when the NAACP made an argument almost identical to that of the Indiana Democratic Party in this case. *Common Cause/Georgia*, 504 F.Supp.2d at 1372. The district court found that the "injury" of reallocating funds is completely of the making of the organization, without evidence that the organization had expended any funds as a result of the photo identification law. *Id.* at 1372-1373. As is the case here, and unlike the organization in *Havens*, the NAACP also only said it would devote funds at some point in the future. *Havens*, 455 U.S. at 379; *Common Cause/Georgia*, 504 F.Supp.2d at 1372-1373.

Extending the holding of *Havens*, as the Seventh Circuit did in this case, undermines the concept of standing by allowing any organization to create standing by merely claiming that a law would result in a reallocation of its funds at some point in the future. *Id.* at 817. The requirement of an "injury in fact" is reduced to a mere "allegation of possible harm," and potentially allows every organization to

assert standing in its own right instead of bringing claims on behalf of its members. This Court and other federal courts face the distinct possibility of rendering a large number of opinions where no actual case or controversy exists. It is a major change in U.S. law to conclude that the " 'irreducible' constitutional minimum" of standing by showing an injury in fact is not required for an organization to pursue a claim in federal court. *Warth*, 422 U.S. at 498-99.

But even if this Court did extend *Havens*, there is no clear evidence that those less likely to possess photo identification are members of the Indiana Democratic Party. The Seventh Circuit relies on conclusory statements related to the likelihood of lower-income individuals to lack photo identification to support the concept that Democrats are less likely to possess photo identification, but the Seventh Circuit does not point to a specific study that yields that same conclusion. *See Crawford*, 472 F.3d at 951. The district court in Georgia dismissed a similar attempt to show a connection between partisan and income-based likelihood to lack photo identification under a *Daubert* motion. *Common Cause/Georgia*, 504 F.Supp.2d at 1371. The district court in Indiana discussed at length why the expert report offered by Petitioners to show discrimination was generally unhelpful. *Rokita*, 458 F.Supp.2d at 802-809.

Petitioners' reliance on *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise* 501 U.S. 252 (1991) is also inappropriate in this case. While Petitioners argue that this Court found standing for an organization based on frustration of

the group's primary purpose, this Court focused on the alleged personal injury to the respondents due to "increased noise, pollution, and danger of accidents," before also citing the increased difficulty for the group to fulfill its purpose. *Id.* at 264-265. The assertion of frustration of purpose without more was insufficient to establish an injury in fact. *Id.* If frustration of purpose alone is a sufficient basis for finding jurisdiction without any additional injury requirement, then groups wishing to challenge laws could create organizations with a "purpose" that would be affected by a law without ever having to show any injury in fact. Extending the doctrine of standing to this point renders it almost meaningless.

If the Court finds that frustration of purpose alone is sufficient to confer standing, *Metro Washington* still does not provide support for Petitioners' position. *Id.* CAAN had a very clear purpose in *Metro Washington*: to reduce noise and aircraft activity at Washington National Airport. *Id.* at 265. There is a clear connection between the challenged authority and a reduction in aircraft activity. *Id.* The primary purpose of the Indiana Democratic Party is not nearly as clear-cut as the purpose of CAAN, and there is no clear connection between photo identification requirements and the purpose of the Indiana Democratic Party. The Indiana Democratic Party will undertake the same activities regardless of whether the photo identification requirement is enforced. Thus, *Metro Washington* is inapplicable to this case.

Tex. Democratic Party v. Benkiser is also distinguishable in that it involved a very clear

financial injury that occurred to the state party, not a vague potential injury. 459 F.3d 582 (5th Cir. 2006). In *Benkiser*, the Fifth Circuit upheld the standing of the Texas Democratic Party because the party had a clear injury in fact. *Id.* at 586. If the state allowed the withdrawal of then-Congressman Tom DeLay, the Texas Democratic Party would be required to raise a large amount of funds for a specific time frame to run a more competitive race. *Id.* The court could readily identify the actual injury in *Benkiser*. *Id.* In contrast, the Indiana Democratic Party merely offers vague assertions of changes to internal accounts based on the photo identification requirement. *Rokita*, 458 F.Supp.2d at 816. The court in *Benkiser* also relied on the harm to the election prospects of the Texas Democratic Party, providing another basis for an injury in fact that the Indiana Democratic Party is unable to show in this case, because it cannot conclusively state the partisan impact of the law. *Benkiser*, 459 F.3d at 586-587.

3. The organizational plaintiffs cannot assert claims by those who forget or lose their photo identification

The district court incorrectly determined that the Indiana Democratic Party has the ability to bring claims on behalf of voters who forget or lose their photo identification. *Rokita*, 458 F.Supp.2d at 812. An individual who forgets photo identification is no different from an individual who forgets any other form of identification that may be required by his or her state, or that was required by the state of Indiana prior to passage of the photo identification requirement. Additionally, the Indiana Democratic

Party is unable to identify these voters. *Id.* at 811-812. It is entirely possible that the voters who forget their identification are part of different political parties. *Id.* The Court has made clear that a mere hypothetical harm is not enough to grant standing to a particular plaintiff. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). The Court should not rely on this potential issue to create standing in this case.

The Indiana Democratic Party and the other organizational plaintiffs do not have standing to assert claims on behalf of individual members or in their own right. They have not suffered a legally-cognizable harm to themselves, and have no members which have standing to bring an independent action.

C. Individual Plaintiffs Lack Standing to Assert Any Claims

The individual plaintiffs do not have standing to pursue claims that their constitutional rights are violated by the photo identification requirements. In order to assert a claim, the individual plaintiffs must show an actual or imminent invasion of a legally-protected interest. *Lujan*, 504 U.S. at 560. The individual plaintiffs in this litigation simply cannot show that any legal interest is even affected, let alone invaded. Some of the individual plaintiffs in this case already have photo identification, and others have ready access to photo identification, including one plaintiff that actually works at the Bureau of Motor Vehicles ("BMV"). *Rokita*, 458 F.Supp.2d at 798-799

Contrary to the finding of the district court, merely not having photo identification does not confer

standing on an individual. The district court in *Common Cause/Georgia* recognized that failure to possess photo identification does not invade a legally-protected interest, because there are clear alternatives available to vote without identification. 504 F.Supp.2d at 1373-1374. Individuals who lack photo identification could easily obtain a free card from the state, or the individuals could choose to vote by absentee ballot with no photo identification requirement. *Id.* at 1377-1379; *Rokita*, 458 F.Supp.2d at 812-813, 827. While the *Rokita* court found that the imposition of a barrier to voting is sufficient to show invasion of an interest and grant standing to individual plaintiffs, it failed to take into account that no barrier has actually been erected by the statute because of the available alternatives to in-person voting. *Rokita*, 458 F.Supp.2d at 813-814. Individuals can obtain absentee ballots and freely vote without photo identification. *Id.* at 812-813, 827. Individuals can go to the BMV and obtain free identification cards that allow them to vote in person if they so choose. *Id.* Individuals can vote a provisional ballot and return with sufficient identification prior to certification of the election results. *Id.* The court in *Common Cause/Georgia* correctly recognized that simply requiring photo identification is not by itself a burden on the right to vote. 504 F.Supp.2d at 1377-1378.

Because no individuals are harmed by the photo identification law, there are no individuals with standing to pursue any claims in this litigation. Without any individual plaintiffs, the legislators cannot represent the interests of their constituents or any other individuals who may be affected by the

photo identification law. *See Laidlaw*, 528 U.S. at 181.

In spite of the best efforts of the Petitioners, no group or individual before this Court has standing to pursue the claims in the Petition. No individual or group has demonstrated the invasion of any legally-protected interest by the actions of the defendants, and cannot show standing to pursue any claims.

II. THE VOTER ID LAW IS A REASONABLE MEANS TO SERVE THE STATE'S COMPELLING INTEREST IN PRESERVING THE ACTUAL AND PERCEIVED INTEGRITY OF ELECTIONS.

There are two ways to disenfranchise a voter. One is to deny an eligible voter the opportunity to cast a ballot. The other is to allow an ineligible voter to cast a ballot that negates the properly-cast vote of an eligible voter. The latter is just as effective a means of disenfranchisement as the former:

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Purcell v. Gonzalez, ___ U.S. ___, 166 L.Ed. 2d 1, 4 (2006), *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The inability of petitioners and their *amici* to recognize that simple truth infects every aspect of their briefing, from the standard of review to the

deference due to the State of Indiana to the reasonableness of the Voter ID law.

A. Courts should defer to the legislative judgment about the wisdom of the Voter ID law

This Court has always recognized the difference between substantive restrictions on the right to vote and procedural requirements for the exercise of that right. The Constitution specifically delegates to the states the authority to implement the latter. Because the Voter ID law does not impose a severe burden on the right to vote, the Court should defer to the legislative judgment about the wisdom and necessity of such a law to avoid corruption in the electoral process.

This Court has held that many voting requirements were "constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995) (emphasis original). Accord, *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

Article I § 4 of the Constitution grants "broad power," *Cook*, 531 U.S. at 523," to the states to regulate the procedure for elections: "The Times, Places, and Manner of holding Elections for Senators

and Representatives, shall be prescribed in each State by the Legislature thereof."[3]

The Court has held that this delegation includes, not just the nuts and bolts of holding elections, but fraud prevention as well:

> [T]hese comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, **prevention of fraud and corrupt practices**, counting of votes, duties of inspectors and canvassers, and making and publication of election returns . . . .

Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added).

Voting being a fundamental right, the deference due the state legislature is not unlimited. The Court must weigh "the character and magnitude of the asserted injury" against "the precise interests" the state is seeking to serve. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). A restriction deserves strict scrutiny only when it places "severe burdens on plaintiffs' rights." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). When the burden is not severe, the review is "less exacting" and a "State's important regulatory interests will usually be enough

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[3] Article II § 1 also vests authority in the state legislatures to determine the method of choosing electors for the presidency.

to justify reasonable, non-discriminatory restrictions." *Id.*, *quoting Burdick*, 504 U.S. at 434 (internal punctuation omitted). *Accord*, *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("[w]e have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process").

For a variety of reasons, the Court should find that the burden here imposed is insufficiently severe to warrant strict scrutiny. Instead, the Court should defer to the expertise of the legislature.

First and foremost, as the Seventh Circuit recognized, strict scrutiny "would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger." 472 F.3d at 852. The objective of voter ID is to prevent an ineligible voter from disenfranchising an eligible voter by nullifying the latter's ballot:

> [T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quint-essentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.

Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005).

In the context of campaign finance laws, the Court has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Fed.*

Election Comm'n v. Nat'l Right to Work Committee, 459 U.S. 197, 210 (1982). As vote fraud is one type of electoral corruption, the Court should apply the same standard here.

The National Voter Registration Act, the so-called Motor Voter Law, 42 U.S.C. § 1973gg *et seq.*, and the voter id provisions of the Help America Vote Act (HAVA), 42 U.S.C. § .15483, both make it substantially easier to register to vote. The minimal voter ID provisions in HAVA make it considerably easier for ineligible voters to register.

Suppose an eligible voter challenged these statutes on the ground that they increased the likelihood of vote fraud. One doubts that this Court would apply strict scrutiny to such a challenge. Instead, the Court would defer to Congress on just where on the continuum the line should be drawn.

Second, photo ID is a widely used form of identification that virtually everyone has and is relatively easy to get. The district court found as a fact that more than 99% of all Indiana voters already had photo ID in the form of a valid driver's license. 458 F.Supp. 2d at 807. Indiana's requirements for obtaining photo ID are not materially different from those in the federal National Driver Register, 49 U.S.C. § 30301.

Photo ID is essential for the exercise of numerous rights. To exercise the constitutional right of access to the federal courts, one must present valid photo ID even to enter the building. To exercise one's constitutional right to travel to the seat of

government to petition Congress, photo ID is a prerequisite to boarding the aircraft. Most banks will not disburse cash without a photo ID; many commercial office buildings deny access to visitors without photo ID. As the district court held:

> The incontrovertible fact that many public and private entities already require individuals to present photo identification substantially bolsters the State's contention that among all the possible ways to identify individuals, government-issued photo identification has come to embody the best balance of cost, prevalence, and integrity.

458 F.Supp. 2d at 826 (internal punctuation omitted).

Third, the district court found as a matter of fact that petitioners could not identify a single eligible voter who would be unable to cast a ballot due to the photo ID law, 458 F.Supp. 2d at 822, and that petitioners' statistical evidence was "utterly incredible and unreliable." *Id.* at 803:

> [I]t is a testament to the law's minimal burden and narrow crafting that Plaintiffs have been unable to uncover anyone who can attest to the fact that he/she will be prevented from voting despite the concerted efforts of the political party and numerous interested groups who arguably represent the most severely affected candidates and communities.

Id. at 823.

Fourth, the law provides an escape hatch for those who forget their photo ID or cannot obtain one for religious or economic reasons. The voter may cast a provisional ballot and validate that ballot by appearing at the clerk of courts or county election board within ten days of the election and providing photo ID. If the voter has religious objections to photo ID, or is indigent, the voter can execute an affidavit to that effect and the provisional ballot will be counted.

This is no more burdensome than a state requirement that a voter register, in order to vote, "within a state-defined reasonable period of time before an election" – a burden that this Court characterized as "minimal." *Clingman v. Beaver*, 544 U.S. 581, 590-91 (2005) (internal punctuation omitted). It is considerably less onerous than the rule upheld in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), requiring such registration eight months before the presidential primary and 11 months before the non-presidential primary.

To be sure, it is theoretically possible to imagine an eligible first-time applicant, not indigent, who encounters unexpected difficulties in obtaining the necessary primary documents. But this is a one-time problem; once in possession of photo ID, the applicant need not submit any more primary documents.

It is also a problem that can be easily resolved by a little foresight and a little diligence. If the applicant starts the process of obtaining primary documents early enough before the election, those

obstacles can be overcome in time to be in possession of photo ID once the election rolls around.

In *Rosario*, the voter had to have enough foresight and initiative to act eight months before the presidential primary. The Court held that was not an undue burden in light of the importance of preserving "the integrity of the electoral process." 410 U.S. at 761. It is inconceivable that any significant number of people could not track down primary documents in eight months.

Fifth, applying strict scrutiny to this modest reform would almost surely end any further efforts to stamp out vote fraud. Justice Brandeis was right: "[O]ne of the peculiar strengths of our form of government" is "each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'" *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973), *quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

Prompted by the Baker-Carter Report, many states are tinkering with their election laws to root out vote fraud. Perhaps some of those efforts will work better than photo ID. Or perhaps there are better ways to implement photo ID than Indiana's. *Rodriguez* held that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education," 411 U.S. at 50, and the same is true of efforts to eradicate vote fraud.

The flexible and deferential legal standard announced in *Burdick* permits the states to function as laboratories of democracy. It recognizes that the legislature is far better equipped than courts to draw the delicate balance between encouraging all eligible voters to cast ballots and discouraging ineligible voters from trying to do so.

Petitioners and their *amici* argue that they are entitled to strict scrutiny if they can prove that photo ID prevents so much as one eligible voter from voting. This Court has never adopted so draconian a rule. *Burdick* itself recognizes that every election rule affects "at least to some degree" an eligible voter's right to vote. 504 U.S. at 433:

> Accordingly, the mere fact that a State's system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny.

Id. (citations and internal punctuation omitted).[4]

Instead, the Court required a balancing test, weighing the "magnitude" of the injury against the state's interests. 504 U.S. at 434. As the Seventh Circuit recognized in the instant case, the "fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer." 472 F.3d at 952. *See Nixon v. Shrink*

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[4] The Court has repeatedly equated ballot access and voting rights cases as equivalent for purposes of constitutional analysis. *Burdick*, 504 U.S. at 438, *quoting Bullock v. Carter*, 405 U.S. 134, 143 (1972).

Missouri Government PAC, 528 U.S. 377, 396 (2000) ("a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional").

One suspects that petitioners and their *amici* would not be thrilled if their logic were applied to laws like the Motor Voter Law or HAVA that are designed to encourage voter registration. Such laws inevitably make vote fraud easier. If the disenfranchisement of a single voter is enough to require strict scrutiny, then a single act of vote fraud requires strict scrutiny and, most probably, invalidation of these laws. That is no more reasonable than ousting photo ID if it excludes a single eligible voter.

Petitioners simply refuse to recognize that vote fraud disenfranchises eligible voters just as much as refusing to count their ballots in the first place. Reasonable people can, of course, disagree on where the line should be drawn. But that is precisely why *Burdick* adopts a deferential standard of review that the Court should apply in the instant case, just as it did in *Nat'l Right to Work*.

B. The Indiana Legislature could reasonably have concluded that Photo ID was a reasonable response to voter fraud

The district court made a number of factual findings, none of which are seriously contested. Those factual findings clearly establish that the Indiana legislature could reasonably have concluded

that vote fraud was a serious problem; that photo ID was a reasonable solution; and that photo ID would not seriously impact eligible voters.

1. The Legislature could reasonably have concluded that both the fact and the perception of voter fraud was a serious problem.

The district court held that, to the extent that Indiana was required to provide empirical support for its concerns about vote fraud, "it has clearly done so." 458 F.Supp. 2d at 826. The foundation for that factual finding is the conclusions of the bi-partisan Baker-Carter Report and the experience of other states with serious vote fraud.

The Comm'n on Fed. Election Reform, Report, *Building Confidence in U.S. Elections* (Sept. 2005) (Baker-Carter Report) (co-chaired by former Democratic President Jimmy Carter) concluded that "there is no doubt" that both vote fraud and multiple voting occur and "could affect the outcome of a close election." App. 138. The Report also concluded that the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." Baker-Carter Report at 18.

The most egregious illustration of actual fraud is the 2004 Washington State gubernatorial election, in which the winner had a plurality of 129 votes. In post-election litigation, the trial court concluded that more than 1,600 ballots had been fraudulently cast. Since the court could not determine how many of

those fraudulent votes had been cast for the winner, it refused to set aside the election. State S.J. Ex. 3 at 4-5; 19.

Other recent examples of election fraud, accepted as true by the district court, include:

- In Milwaukee in the 2004 general election, more that 200 ineligible felons voted; more than 100 persons voted twice, used fake names or false addresses, or voted in the name of dead people. More than 4,500 votes were cast than voters listed. State S.J. Ex. 4 at 2-4.

- In St. Louis, in the 2000 general election, there were more than 1,000 fraudulent ballots cast, including 14 dead people, 68 multiple votes, and 79 vacant-lot votes. Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (2004) at 64.

- In the 1997 Miami mayoral election, dozens and perhaps hundreds of persons not residing in the city cast fraudulent ballots. State S.J. Ex. 10 at 1-2.

- The Department of Justice has conducted more than 180 investigations into voter fraud since 2002, making 89 charges and securing 52 convictions. State S.J. Ex. 2 at 23.

- Dead people voted in Georgia, Illinois, and Pennsylvania. State S.J. Ex. 12-14; 18. The Seventh Circuit has held that voter fraud "is a serious problem in U.S. elections generally" and Illinois has a "particularly gamey history" of voter fraud. *Roupas*, 385 F.3d at 1130-31.

That is precisely the kind of empirical information on which this Court has held a legislature may reasonably rely in making policy. In *Nixon*, the Court rejected a First Amendment challenge to Missouri's restrictions on campaign contributions based on the State's interest in avoiding corruption. The evidence on which the Court relied included:

- The state treasurer gave the state's banking business to a bank that had contributed $20,000 to the treasurer's campaign.

- The state auditor got $40,000 from a brewery and $20,000 from a bank.

- A political action committee linked with an investment bank gave $420,000 to candidates in northern Missouri.

- A state representative was accused of taking kickbacks for sponsoring legislation.

- A state attorney general was indicted for using the state workers compensation fund to benefit campaign contributors.

Nixon, 528 U.S. at 393-94. The Court described this evidence as "not present[ing] a close call." *Id.* at 393. *Accord*, *Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976) (relying on the Seventh Circuit's description of incidents of corruption caused by campaign contributions).

Petitioners and their *amici* make much of the fact that no one in Indiana has ever been charged with voter fraud based on impersonating another voter. The inference they seek to draw from that fact is that such fraud never occurs. As the Seventh Circuit observed, it was at least as reasonable for the legislature to infer that the "extreme difficulty of apprehending a voter impersonator" explains the absence of such prosecutions. 472 F.3d at 953. Under *Burdick*, the Court should defer to the legislature on which inference is most plausible.

The legislature was also entitled to consider the ample evidence of a public perception that voter fraud was a serious problem. This Court has recognized that the appearance of corruption in elections is "[o]f almost equal concern" as actual corruption. *Nixon*, 528 U.S. at 389, *quoting Buckley*, 424 U.S. at 26, and cases there cited (internal punctuation omitted). The "avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent." *Id.* (internal punctuation omitted). *Accord*, *Purcell*, ___ U.S. at ___, 166 L.Ed. 2d at 4 ("[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy").

There is substantial evidence in the record proving that the public believes, by wide margins, that vote fraud occurs:

- Before the 2000 elections, a Rasmussen poll showed that 59% of the electorate believed that there was "some" or "a lot" of vote fraud. State S.J. Ex. 22 at 1.

- After those elections, a Gallup poll showed that 67% of adults had only "some" or "very little" confidence in the way votes were cast. State S.J. Ex. 23 at 8-9.

- A 2004 Zogby poll found that 10% of voters believed their votes were not accurately counted. Fund, *Stealing Elections* at 2.

- More than 13.6% of Americans believed that the 2004 presidential vote was unfair. State S.J. Ex. 24 at 1.

Thus, the Indiana legislature had an ample basis for believing that vote fraud was a serious problem requiring a reasonable response

2. The Legislature could reasonably have concluded that Voter ID is a reasonable way to combat voter fraud.

There is no question that combating voter fraud is a compelling state interest, and for precisely the same reason that access to the ballot box is a

fundamental right: voter fraud disenfranchises eligible voters whose votes are nullified by fraudulent ones. Voter ID is a reasonable means to accomplish that compelling interest.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, ___ U.S. at ___, 166 L.Ed. 2d at 4, *quoting Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (internal punctuation omitted). Petitioners and their *amici* admit as much.

We have already alluded to some of the reasons why voter ID is a reasonable response to the problem of voter fraud: virtually everyone has government-issued photo ID; such ID is required for a host of activities; and a voter without photo ID can cast a provisional ballot and then validate that ballot with relative ease.

Perhaps the best evidence that voter ID is a reasonable response to the problem is that the bipartisan Baker-Carter Commission recommended it. The Baker-Carter Report recites that:

- Effective voter ID is one of the "bedrocks of a modern election system." Report at 10.

- "[I]n close or disputed elections, and there are many, a small amount of fraud could make the margin of difference." Report at 18.

- "Photo IDs are currently needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." *Id.*

Indeed, the Baker-Carter Report is considerably stricter than the Indiana law here at issue with respect to provisional ballots. The Report recommends that voters be allowed to cast such ballots. After the 2010 elections, however, it recommends that the voter only have 48 hours to validate the provisional ballot, compared with ten days under Indiana law. And it does not have the escape hatch for indigent voters or those with religious objections to photo ID. Report at 20-21.

Moreover, there is a wide and growing consensus in favor of voter ID. In 2001, only 11 states required it. By September 2005, when the Baker-Carter Commission issued its report, 24 states required it and 12 more were considering doing so. Report at 18. Indiana's requirements for verifying citizenship are quite similar to those set forth in the National Driver Register, 49 U.S.C. § 30301.

Finally, there is strong public support for voter ID. As the district court found, 458 F.Supp. 2d at 794, a 2004 Zogby poll found that 82% of respondents, including 75% of Kerry supporters, favored photo ID. *Nixon* relied on similar, though less overwhelming public support, in finding Missouri's campaign finance restrictions to be reasonable. 528 U.S. at 394. It should do the same with voter ID.

Thus, the legislature had ample basis for believing that voter ID is a reasonable way to combat vote fraud.

3. The Legislature could reasonably have concluded that Voter ID would not seriously impact eligible voters who currently lack such identification.

Likewise, the Legislature had ample reason to conclude reasonably that Voter ID would not seriously impact eligible voters who currently lack such identification. First, there are the exemptions discussed above, principally the exemption for absentee ballot voting by mail. Among those automatic entitled to cast absentee ballots are Indiana's disabled and senior voters over age 65. Ind. Code § 3-11-1-24. In addition, residents of state-licensed care facilities who vote at polling places within those facilities are exempted from the Voter ID requirement. Ind. Code § 3-10-1-7.2; 3-11-8-25.1(e). Thus, the Legislature provided exemptions for foreseeable categories persons who were less likely to be able to travel to obtain Voter ID. Finally, the Voter ID law allowed any person who failed to present photo identification at the polls to complete a provisional ballot, and to provide the photo identification to an election office within 10 days. Thus, the Indiana law is replete with exemptions adopted to mitigate potential impacts of the Voter ID Law. The fact the law has been administered without any indication of problems with compliance since its enactment in 2005, combined with the 2006 data indicating that 99% of Indiana's voting age population had the requisite Voter ID, demonstrates

the Voter ID law does not "severely burden" voting rights, and is constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,130 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December __, 2007.

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Charles H. Bell, Jr.

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MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

– v. –

TODD ROKITA, *et al.*,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals for the Seventh Circuit

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF INDIANA, INC., THE LEAGUE OF WOMEN VOTERS OF INDIANAPOLIS, INC. AND THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS [INDIVIDUAL INDIANA VOTERS]

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INTEREST OF THE *AMICI CURIAE*[1]

> *"The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy."*
>
> Mission Statement,
> League of Women Voters of the United States

The League of Women Voters of the United States was founded on the belief that the right to vote is an integral component of what it means to be a citizen. In February 1919, at the National American Woman Suffrage Association's Fiftieth convention, Carrie Chapman Catt proposed to create a "league of women voters to finish the fight [for getting women the vote] and to aid in the reconstruction of our nation." Six months prior to the ratification of the Nineteenth Amendment, which granted women the right to vote, the League of Women Voters of the United States was born. It has worked for many years to encourage participation by all citizens in

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[1] The parties have given blanket consents to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Special thanks is extended to Troy D. Liggett, Catherine A. Clements and John T. Schlafer, 2009 J.D. Candidates, Indiana University School of Law—Bloomington, for their assistance.

the electoral process, and it has worked to facilitate the casting of ballots that will be counted.

The League is organized in more than 850 communities and in every State, with more than 150,000 members and supporters nationwide. The League of Women Voters of Indiana, with more than 1100 members and eighteen local organizations including the League of Women Voters of Indianapolis, also has a long history of working for citizen participation in government. (The three League of Women Voters entities appearing as *amici curiae* are referred to collectively as "the League.") The League remains a nonpartisan, political, grassroots organization that is directed by its members, who work to provide voters, without regard to political affiliation, with resources and information in support of the League's objective—to facilitate the exercise of the constitutional right to vote. The League has evolved from an organization focused upon the needs of women and the training of women to participate in the democratic and electoral processes to an organization concerned with the education of all voters, ensuring that democracy works for all citizens.

The League is deeply concerned that the current version of the Indiana Voter ID Law[2] unconstitutionally burdens the individual's right to vote.

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[2] As used herein, "Voter ID Law" refers to Ind. Sen. Enrolled Act 483, 2005 Ind. Legis. Serv. 109-2005 (codified at Ind. Code §§ 3-5-2-40.5; 3-10-1-7.2; 3-11-8-25; 9-24-16-10; as well as scattered sections of Ind. Code § 3-11-8, *et seq.* and Ind. Code § 3-11.7, *et seq*).

SUMMARY OF THE ARGUMENT

The right of an individual citizen to vote is a personal right. *United States v. Bathgate*, 246 U.S. 220, 227 (1918). Although the Indiana voters who are personally burdened by the Voter ID Law may be a minority, the number of voters burdened does not determine whether an individual's fundamental right to vote has been impermissibly infringed. The focus of constitutional inquiry is correctly on the burdens to a given individual, and not on the raw number of people burdened.

Because the litigation over the Voter ID Law commenced before the law's implementation, little evidence of how the law actually impacted individual voters was available to the District Court prior to its grant of summary judgment. The League, as *amici curiae*, presents the actual experiences of Indiana voters, who, although not parties to the action, exemplify the manner in which the Voter ID Law burdens the exercise by Indiana citizens of their fundamental right to vote. The League believes that these interferences require finding the Voter ID Law unconstitutional, or alternatively, vacating the decision of the Seventh Circuit and remanding to the District Court for further proceedings.

There are two basic infirmities presented by these stories. First, the Voter ID Law unconstitutionally burdens Indiana voters in a number of ways. As the Seventh Circuit's majority opinion recognized, *see Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), the Voter ID Law will prevent some Indiana voters from voting; indeed, as set

forth below, it has done so. Indiana voters without photo identification or with photo identification deemed to be inadequate are shuttled into a costly and burdensome "provisional" ballot process that requires them to make a separate appearance before the county election board to have their votes counted. Ind. Code § 3-11.7-5-2.5.[3] Elderly and disabled voters, unable to get proof of identification, are required to cast absentee ballots despite desiring to vote in person.

Second, the Voter ID Law vests unfettered discretion in the polling officials—who are political appointees—to challenge a voter's right to vote. The Voter ID Law requirements that the ID contain a "conform[ing]" name and a photographic likeness of the voter are particularly discretionary in their practical application, yet the Voter ID Law does not provide the constitutionally required limitations on that discretion, nor indeed any guidelines for its exercise at all. An election worker's decision to send a prospective voter through the provisional ballot process is not subject to an Election Day appeal, making any subsequent oversight or review an inadequate remedy to the burden imposed on the voter. The individuals described in Point II either have already been forced to cast a provisional ballot, or have a substantial risk of having to do so, as a result of an impermissibly unguided discretionary determination by an election worker.

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[3] Because the circuit court clerk is a member of the county election board, *see* Ind. Code § 3-6-5-2, all references to the county election board herein should be read to include the circuit court clerk.

ARGUMENT

POINT I

THE VOTER ID LAW SUBSTANTIALLY BURDENS THE EXERCISE OF INDIANA CITIZENS' CONSTITUTIONALLY PROTECTED, PERSONAL RIGHT TO VOTE

The Voter ID Law imposes upon a voter the affirmative obligation to present proof of identification[4] issued by the State of Indiana or the United States bearing a "conform[ing]" name and a photo of the voter. Ind. Code § 3-5-2-40.5. If the polling officials reviewing the identification find that it fails to satisfy the Voter ID Law, then the voter is required to cast a provisional ballot. *Id.* § 3-11-8-25.1(c),(d). A provisional ballot is not counted unless the voter

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[4] Under the Voter ID Law, "proof of identification" must satisfy all of the following:

(1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.

(2) The document shows a photograph of the individual to whom the document was issued.

(3) The document includes an expiration date, and the document:

(A) is not expired; or

(B) expired after the date of the most recent general election.

(4) The document was issued by the United States or the state of Indiana.

Ind. Code § 3-5-2-40.5.

subsequently appears before the county election board in the ten days following Election Day and takes the steps necessary to prove the voter is who she claims to be. *Id.* §§ 3-11.7-5-1(b), -2.5. The provisional ballot is counted only if the county election board is satisfied with the voter's proof of identification, or if the voter signs an affidavit swearing indigency or a religious objection to having a photograph taken. *Id.* § 3-11.7-5-2.5(d).

The Seventh Circuit Court's rejection of the challenge to the Voter ID Law is based on the idea that presentation of proof of identification to vote cannot be an undue burden because there are so few who are likely to be affected by it. *See Crawford*, 472 F.3d at 952 ("The fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer."). This reasoning misunderstands the nature of the right to vote as it has long been defined by this Court. "The right to vote is personal," *Bathgate*, 246 U.S. at 227, and "a value in itself" not to be determined by "mathematically calculating [each individual voter's] power to determine the outcome of an election." *Bd. of Estimate v. Morris*, 489 U.S. 688, 698 (1989). Thus, the right to vote is decidedly not a group right; nor is the value of that right simply "instrumental," as the Seventh Circuit majority opined. *See Crawford*, 472 F.3d at 951.

Instead, as was recognized by Judge Wood in her dissent from the Seventh Circuit's denial of rehearing *en banc*:

> Voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. Even if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a "severe" injury for that particular individual.

Crawford v. Marion County Election Bd., 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from denial of reh'g en banc). Assessing whether the Voter ID Law unconstitutionally burdens the right to vote is not a matter of counting how many Indiana citizens might be affected, but rather of assessing the extent of those burdens on each individual herself.[5]

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[5] Because the constitutionality of the Voter ID Law is assessed by its effect on individual voters rather than its effects on the electoral system as a whole, the Seventh Circuit's contention that only "a few" Indiana voters will be deterred from voting, *see Crawford*, 472 F.3d at 952, is irrelevant. Nevertheless, even deterring small numbers of voters could be outcome-determinative in Indiana.

For example, in the recent November 6, 2007 election, there were several contests that may be determined by provisional ballots. *See, e.g.*, Nick Werner, *Few uncounted votes linger in Muncie mayoral election*, Muncie Star Press, Nov. 8, 2007, http://www.thestarpress.com/apps/pbcs.dll/article?AID=/20071108/0349 ("McShurley's best and possibly only chance at earning votes is likely going to come from the provisional ballots . . . [t]he majority of [which] were challenged on the basis that the voter did not provide identification at the polls"); Ken de la Bastide, *Dems to seek recount*, Kokomo Tribune, Nov. 7, 2007,

The problem with the Voter ID Law is that the moment a voter is challenged, the burden to have that vote counted shifts to the voter, who is sometimes unable to shoulder that burden. The stories of individual citizens of Indiana presented below may be atypical of the experience of most Indiana voters. And yet, they are also not lone outliers. For each individual discussed herein, there are likely hundreds of Indiana citizens who either have confronted or will confront similar situations under the Voter ID Law. The experiences of these Indiana voters illustrate the burden imposed by the Voter ID Law. They tell the story of how—voter by voter—the Voter ID Law is unconstitutionally abridging a cherished and fundamental right.

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http://www.kokomotribune.com/archivesearch/local_story_311220528.html (recount sought in three council races); Marisa Kwiatkowski, *C.P. race still in doubt*, The Times, Nov. 8, 2007, http://nwi.com/articles/2007/11/08/news/lake_county/docc00dec547575de178625738d000c3b67.txt (with three vote difference, "totals [in Crown Point Indiana council race] include absentee ballots but do not count provisionals"); Tom Wyatt, *Candidate may seek recount*, Post-Tribune, Nov. 8, 2007, http://www.post-trib.com/news/640850,velexfolo.article; Barry William Walsh, *Race comes down to less than 1 percent*, Chronicle-Tribune, Nov. 7, 2007, http://chronicle-tribune.com/apps/pbcs.dll/article?AID=/20071107/NEWS01/71106039&SearchID=73298863724687; Benjamin Lanka, *9-term council veteran on bubble in Fort Wayne*, The Journal Gazette, Nov. 7, 2007, http://journalgazette.net/apps/pbcs.dll/article?AID=/20071107/ELECTION01/711070398 (with nine vote difference in council race "there were seven provisional ballots not counted in the total and a number of absentee ballots not counted because of questions on their validity").

A. 92-Year-Old Mary Wayne Montgomery Eble Is Physically Capable Of Voting In Person But Cannot Do So Because Of The Voter ID Law

Mary Wayne Montgomery Eble, an Indiana businesswoman who is 92 years old, wanted to cast her ballot in person in November 2006, as she has done most of her adult life. This time, however, she was not able to vote at the polls, simply because she lacked proof of identification.[6]

A few years ago, Ms. Eble suffered a vision loss and when she stopped driving, she did not renew her driver's license. She lives, as she has done nearly all of her life, on her family's farm outside of Rockport, Indiana, the county seat. Unfortunately, the Rockport branch of the Indiana Bureau of Motor Vehicles ("BMV") was one of many closed by the state. To get an Indiana identification card, Ms. Eble would have to go to the BMV branch in Dale, Indiana, approximately forty-five minutes away. The rural area in which Ms. Eble's farm is located does not have much in the way of transportation assistance for the elderly. There is one van that serves the elderly of the area and, as it is a rural area, there is no public transportation.

But before Ms. Eble could even visit the BMV in Dale, she would have to go to Rockport, Indiana, to get a certified record of her birth. It is a one-hour

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[6] Unless otherwise noted, the facts regarding the specific Indiana citizens mentioned herein are set forth at the League of Women Voters of Indiana web site, http://www.lwvin.org.

round trip to Rockport for Ms. Eble. Moreover, because she was born at home, Ms. Eble is not certain what records might be available to her.

Voting is important to Ms. Eble. Her mother, Judith Montgomery, was a suffragette who fought to secure the right to vote for her daughter. In the past, Ms. Eble would travel to her polling place in Hatfield, Indiana. Her granddaughter, Jennifer Byerly, works as an inspector in Rio, Indiana. After voting, Ms. Eble would go to the Hatfield Methodist Church for its fundraising luncheon held every general Election Day. For Ms. Eble, exercising her right to vote is part of a family tradition of participating in self-government.

Even though Indiana allows some of its citizens to vote through casting absentee ballots,[7] some people who qualify for absentee voting, like Ms. Eble, understandably prefer to vote in person. In-person voting allows a voter until Election Day to factor late-breaking news into her candidate selection. And it avoids the possibility that a ballot cast by mail could be stolen, lost or not delivered in time to be counted. But most importantly for many Indiana citizens

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[7] Under Indiana law, a voter must satisfy one of the following in order to vote absentee: (1) be absent from the county; (2) be absent from the precinct because of election day services; (3) be confined to residence because of illness or injury; (4) be disabled; (5) be elderly; (6) be a caregiver to one who is confined to residence because of illness or injury; (7) be scheduled to work for the entire twelve hours that polls are open; (8) have moved precincts prior to election day; (9) be prevented from voting for religious observance; (10) be in an address confidentiality program. Ind. Code § 3-11-10-24.

such as Ms. Eble, voting in person at the polling place affords an opportunity to participate as an active citizen in the community. And for those who are unable to interact much in society, the act of voting can be a great leveler—giving those with limitations the ability to contribute to the democratic process with vigor equal to that of other voters.

B. After Considerable Effort To Vote In Person In 2006, 78-Year-Old Navy Veteran Ray Wardell Had To Vote Provisionally in 2007

To vote in person in the November 2006 general election, 78-year old Ray Wardell needed to obtain valid proof of identification. He had neither an Indiana driver's license nor an identification card, so he took a cab to the nearest BMV branch to apply for an identification card. Because he did not have his birth certificate with him, BMV staff told Mr. Wardell that he could not get an Indiana identification card. Because his income was limited, Mr. Wardell, who had recently suffered two strokes, did not take a cab home from the BMV. Instead, he walked home with the aid of a walker.

Mr. Wardell could have substituted his Medicare card for a birth certificate, but the BMV did not share this fact with him. *See* Joseph Dits, *What's required at BMV for photo ID?; For seniors, there are alternatives to birth certificate*, South Bend Tribune, Nov. 5, 2006, at B1. Mr. Wardell later returned to the BMV and was given his identification card after presenting his Medicare card. He

then proceeded to vote in the November 2006 general election.

Two weeks before the November 2007 general election, however, Mr. Wardell was robbed of his wallet, which contained his money and his Indiana identification card. He got a replacement Medicare card, which he took to the BMV (via a motorized scooter this time) in order to obtain a new Indiana identification card. Mr. Wardell presented his Medicare card, just as he did before, but was again told by BMV staff that he needed a certified copy of his birth certificate, and he was not given a replacement identification card. Mr. Wardell, uncertain of the process to get a copy of his birth certificate, was unable to get everything done in time to vote a regular ballot in the November 2007 general election.

Mr. Wardell voted provisionally on November 6, 2007, and must now make a special trip to appear before the county election board if he wants his vote to be counted. Mr. Wardell is a veteran of the Korean War and served four years in the United States Navy. He served his country when it needed him, but to participate now in its elections, he is being forced to undertake a significant additional burden.

C. Kim Tilman, Mother Of Seven, Cannot Afford The Price Of Voting

Kim Tilman is a stay-at-home mother of seven children. Her husband is employed as a janitor and is the sole source of income for the family. Ms. Tilman's Michigan driver's license is not a valid form of identification under the Voter ID Law.

To vote, Ms. Tilman must get an Indiana driver's license or identification card, which means she must provide the BMV with a certified copy of her birth certificate, which she does not have. Because she was born in Michigan, she must obtain a copy of her birth certificate through the Michigan Vital Records Office, which charges a fee of $26.00.[8] Mich. Vital Records Office, *Application for a Certified Copy of a Michigan Birth Record*, available at http://www.michigan.gov/documents/birthapp_6360_7.pdf. The application states the process will take at least four weeks following the date the Michigan agency receives the request, but when Ms. Tilman spoke with a Michigan representative, she was told it would take eight weeks to receive a certified copy of her birth certificate. To expedite the process, Ms. Tilman would need to pay an additional $10.00. Once she has her birth certificate, Ms. Tilman could either apply for an Indiana identification card, which is provided without charge to persons without an Indiana license, *see* Ind. Code § 9-24-16-10, or she could pay $14.00 for an Indiana driver's license.[9] *See* Indiana Bureau of Motor Vehicles, *Dri-*

[8] If Ms. Tilman drives to Michigan and requests her birth certificate in person, there is a $10.00 additional charge to obtain it that same day.

[9] Whether Ms. Tilman could qualify for an Indiana identification card will depend upon how the BMV branch through which she applies interprets BMV regulations. *Cf.* Mike Westervelt, *Editor denied voting right, criticizes agency for law misinterpretation*, The Purdue Exponent, Nov. 9, 2007, http://www.purdueexponent.org/?module=article&story_id=8338 (student denied Indiana identification card because he held an out-of-state driver's license), and Point I.D., *infra*, discussing

ver License Charges, http://www.in.gov/bmv/fees/driverlicense.htm (discussion of Indiana fees).

Thus, the total cost of securing the identification required by Ms. Tilman to vote in Indiana would be between $26.00 and $50.00. To many, this may not seem like a prohibitive expense. But to persons such as Ms. Tilman, it may be the difference between being able to pay for a heating bill, a bus pass or a refill on prescription medicine—and not. For Ms. Tilman, it is simply an expense that her family cannot afford at this time, and she did not vote in 2007. Ms. Tilman hopes that she can afford to secure the necessary identification in time to register and vote in the 2008 presidential election.

Because of the Voter ID Law, Ms. Tilman did not register to vote because she lacked the proof of identification necessary to vote. Ms. Tilman did not understand that proof of identification is unnecessary to register to vote and that once registered, she can vote a provisional ballot. Her provisional ballot can then be counted if she takes the additional step of claiming indigency.

The Voter ID Law allows a voter who lacks proof of identification to cast a provisional ballot. *See* Ind. Code § 3-11.7-2-1(b). If Ms. Tilman does so, her ballot will be counted provided that she appears before the county election board and completes an affidavit claiming indigency. *See id.* § 3-11.7-5-2.5. Unfortunately, although the Voter ID Law does not

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Faye Buis-Ewing, who was given an Indiana identification card and allowed to keep her Florida driver's license.

appear to grant a county election board discretion to deny a claim of indigence, it also does not define what constitutes indigency and thus it does not provide her with guidance as to whether she is entitled to self-identify, under penalty of perjury, as indigent. Moreover, even if particular voters may accurately swear to their indigency under penalty of perjury, the process of having to appear before the circuit court clerk or the election board to attest to their indigence—on a weekday, during working hours—rather than attesting to indigence at the time of voting, erects additional unnecessary and burdensome hurdles to voting for those without the ability to pay for a state-issued ID.

D. Faye Buis-Ewing Had To Go To Extraordinary Lengths To Vote In 2006

Faye Buis-Ewing and her husband are retired and consider Indiana to be their home, even though they spend part of the year in Florida. Ms. Buis-Ewing has been a resident of the Lafayette, Indiana area for approximately fifty years. Her first husband died a few years ago, and she remarried. Because she spends a portion of the year in Florida, Ms. Buis-Ewing maintains a Florida driver's license for convenience.

Ms. Buis-Ewing did not attempt to vote in the primary election in May 2006, the first election in which the new Indiana Voter ID law was in effect, so she did not know about the new photo identification requirements. When she went to vote in November 2006, she discovered she lacked accept-

able identification. Although she could have cast a provisional ballot, she did not want to make a second trip to appear before the county election board. So Ms. Buis-Ewing decided to obtain an Indiana identification card—on Election Day.

She left the polling place and visited the BMV branch in West Lafayette, Indiana with her birth certificate and her new social security card bearing her married name, "Buis-Ewing." The birth certificate was not accepted because it did not bear the name "Buis-Ewing" and her social security card was not accepted as identification. The BMV told Ms. Buis-Ewing that she could alternatively use a utility bill or a mortgage tax bill in her name; however, the utility bills are in her husband's name and she does not receive a separate tax bill for the mortgage. Finally, upon the suggestion of the BMV staff, Ms. Buis-Ewing went to the Social Security Office and successfully obtained a statement verifying her identification.

With her verified statement in hand, Ms. Buis-Ewing returned to the BMV. Upon presentation of the verified statement of identification from the Social Security Office and her Social Security card, Ms. Buis-Ewing finally obtained her Indiana identification card. Four hours after beginning her quest for an Indiana identification card, she returned to her polling place to cast her ballot. The polling place workers were so impressed by her efforts that they gave her a standing ovation. She explained her diligence by saying that she did not want the Voter ID Law to take away her right to vote.

Fortunately for Ms. Buis-Ewing, she had the time to track down the necessary documentation, a means of transportation from office to office, the financial ability to pay for the cost of her travel from office to office and the wherewithal to understand the process. While Ms. Buis-Ewing's experience is illustrative of the type of burden the Voter ID Law imposes, her ability to overcome the burden is exceptional. Such burdens would likely have been too much for persons with fewer resources or less fortitude, thereby deterring them from exercising their fundamental right to vote.

E. Hundreds Of Amish and Mennonites In Indiana Are Faced With A Choice Between Exercising Their Religious Freedom And Their Right To Vote

Indiana provides for the issuance of photo-exempt identification cards and driver's licenses for those whose religion prohibits them from being photographed. *See* Indiana Bureau of Motor Vehicles, *Request for Photo Exempt License/Request for Photo Exempt Identification Card for Religious Reason*, available at http://www.in.gov/icpr/webfile/forms-div/45811.pdf. However, because this type of state identification lacks a photograph, a voter with a photo-exempt identification card or license fails to satisfy the Voter ID Law, from which she is not exempt. Such a voter must cast a provisional ballot and then, if the voter wants her vote counted, she must appear before the county election board and complete another affidavit stating that the voter

objects to being photographed for religious reasons. *See* Ind. Code § 3-11.7-5-2.5(c)(2)(B). All of this must be done by the voter during and after every election, despite having presented this same type of evidence to the BMV to satisfy the requirement to secure the photo-exempt identification or license in the first place.

There were 19,177 Old Amish Order adherents in 244 congregations in Indiana in 2000, and Indiana ranks third in total numbers of Amish, behind Pennsylvania (25,340) and Ohio (24,613). *See* Dale E. Jones, et al., Glenmary Research Center, *Religious Congregations & Membership in the United States 2000*, at 22 (2002). While it is estimated that less than 10% of all Amish vote, *see* Associated Press, *GOP Courts Amish in Swing States,* Aug. 5, 2004, http://www.msnbc.msn.com/id/5613947/, even that would translate into hundreds of voting age Amish in Indiana impacted by the Voter ID Law. Additionally, like the Amish, there are also Mennonites and other Christians who believe that a photograph is a "graven image," the production of which is prohibited by God. *See* Associated Press, *Mennonites Plan to Move Over Photo IDs,* Mar. 21, 2007, http://www.msnbc.msn.com/id/17725931/. *See also Quaring v. Peterson*, 728 F.2d 1121, 1125-27 (8th Cir. 1984) (holding photo requirement for driver's license placed unconstitutional burden on Christian woman), *aff'd by equally divided court sub nom. Jensen v. Quaring*, 469 U.S. 815 (1985).

Thus those Amish and Mennonites who have photo-exempt identification cards and who seek to

vote are improperly burdened because they must prove after every election that their religion prohibits them from being photographed. As with the indigency affidavit, there is no reason the affidavit regarding photo-exempt identification cannot be executed at the polling place on Election Day. Instead, those Amish and Mennonites who do not have mechanized transportation must make the trip to the county election board after each primary and general election. Moreover, Old Order Amish may be reluctant to take steps to assert their right to vote, such as appearing before the county election board or executing a sworn affidavit. Their value of "Gelassenheit," roughly meaning calmness or composure, often translates into an unwillingness to use the legal system to protect their rights. *See* Donald K. Graybill, *Negotiating with Caesar, in* The Amish and the State 3, 12-13 (Donald K. Graybill ed., 1993). The Mennonites have a similar reluctance to engage in formal legal disputes. *See* Mennonite Church USA, Historical Committee, *The Use of the Law: A Summary Statement,* (Adopted by the Mennonite Church General Assembly on Aug. 11-16, 1981), http://www.mcusa-archives.org/library/resolutions/law_1981.html. This makes Amish and Mennonites unlikely candidates for vigorously defending their right to vote in the face of election officials who tell them that their state-issued identification is inadequate.

POINT II

THE VOTER ID LAW IMPROPERLY AFFORDS ELECTION OFFICIALS AND APPOINTED CHALLENGERS UNFETTERED DISCRETION TO BURDEN INDIVIDUAL VOTERS IN THE EXERCISE OF THEIR RIGHT TO VOTE

The right to vote is a fundamental right protected by both the First and Fourteenth Amendments. *See Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (Fourteenth Amendment precludes state from limiting the right to vote in school board elections to property owners and those with school-age children); *Paul v. State of Ind. Election Bd.*, 743 F. Supp. 616, 623 (S.D. Ind. 1990) (noting Supreme Court case law establishing that right to vote is "at the heart" of the First Amendment's protection). This Court has long disapproved of laws vesting officials with unfettered discretion to burden the exercise of First Amendment rights. *See, e.g., Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (assembly and parade ordinance held unconstitutional because it lacked "narrowly drawn, reasonable and definite standards" guiding the responsible administrator (internal quotation marks omitted)); *id.* at n.10 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."); *Cantwell v.*

Connecticut, 310 U.S. 296, 307 (1940) (overturning convictions arising from religious solicitations because "to condition the solicitation of aid for the perpetuation of religious views of systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution"). The Constitution requires that a law granting discretionary action must also assure that the exercise of discretion will be "appropriately confined." *Niemotko v. Maryland*, 340 U.S. 268, 280 (1951) (Frankfurter, J., concurring) (citing *Cox v. New Hampshire*, 312 U.S. 569 (1941)); *see also Forsyth County, Georgia*, 505 U.S. at 131 (a law involving the "appraisal of facts, the exercise of judgment and the forming of an opinion" by a state official risks "abridgment of our precious First Amendment freedoms").

While prospective voters who lack a proof of identification are to be automatically challenged by a member of the precinct election board, *see* Ind. Code § 3-11-8-25.1(c)(1), challenges to the adequacy of a prospective voter's proof of identification are effectively discretionary. The Voter ID Law requires, *inter alia*, that the proffered proof of identification bear a "name [that] *conforms* to the name in the individual's voter registration record" and "show[ ] a photograph *of the individual* to whom the document was issued." *Id.* § 3-5-2-40.5(1)-(2) (emphases added). The Voter ID Law does not define "conform[ ]" (much less resolve how a voter with several varia-

tions of her name should be treated) and it does not explain how the similarity or dissimilarity in likeness of the person pictured on the proof of identification to the prospective voter is to be determined.[10] Nor does the Voter ID Law require any specific training in the consistent application of these criteria. *See id.* § 3-6-6-40 (requiring only that precinct election officers be trained regarding access for disabled voters and voting systems in use in the county, and excusing this requirement where there is insufficient time to provide such training).

These discretionary determinations are made on Election Day at the polling place individually by

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[10] "Conform" can have alternative meanings that would yield contradictory results in the context of the Voter ID Law. For example, Merriam-Webster Online defines "conform" alternatively as "similar" or "identical." *See* http://www.m-w.com/dictionary/conform (last visited Nov. 9, 2007). The Indiana Election Division has encouraged use of a definition of "conform" that would include "common variations" of names, such as the use of common nicknames, initials and middle names (*e.g.*, "Robert John Crew," "Robert J. Crew," "Robert Crew," "R. John Crew," "Bob John Crew," "Bob J. Crew," "Bob Crew," "John Crew" and "J. Crew"). *See* Indiana Election Division Memorandum re: Photo ID Interpretations at 2, *available at* http://www.in.gov/sos/elections/pdfs/PhotoIDAdvisory_4_30_06.pdf. This guidance is of limited practical use—for example, it does not deal with spelling discrepancies, including the one that prevented Janice Tingley from voting in person in 2006, which is described below in Point II.A.1. Even so, the Election Division plays a purely advisory role and cannot require Indiana's 92 county election boards to interpret the Voter ID Law in a consistent manner. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 785-86 (S.D. Ind. 2006); Ind. Code § 3-6-6-40(c).

five appointees of the two major political parties. *See* Ind. Code §§ 3-6-6-1, -8 (appointment of three-person precinct election board); 3-6-7-1 (appointment of challengers, one per precinct from each major political party). Under Indiana Code § 3-11-8-25.1(c)(2), a precinct election board member evaluates whether the proof of identification provided by the prospective voter fails to satisfy one or more of the above criteria. Indiana Code §§ 3-11-8-20 and 3-11-8-21 govern the form of a challenge. *See also* 2007 Election Day Handbook at 21, *available at* http://www.in.gov/sos/elections/hava/pdf/EDH%20Primary%2007.pdf. That the precinct election board members and appointed challengers are subject to certain generalized legal requirements does not alter the inherently discretionary nature of their application of Section 3-5-2-40.5's criteria.[11]

The burdens imposed by the Voter ID Law detailed in Point I above can thus be triggered by the exercise of discretion at the polling place on Election Day by political appointees whose training (if any)

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[11] Precinct election board members are required to affirm that they will "faithfully and impartially discharge" their duties and they will "not knowingly permit any person to vote who is not qualified and will not knowingly refuse the vote of any qualified voter or cause any delay to any person offering to vote other than is necessary to procure satisfactory information of the qualification of that person as a voter." Ind. Code § 3-6-6-23(2), (3). By contrast, a challenger is simply required, when making a challenge, to affirm under penalties of perjury that the challenger is not making a false statement. *Id.* § 3-11-8-21(5). These requirements of course provide no standards for the application of the statutory criteria.

varies from county to county, and whose decisions to require prospective voters to cast provisional ballots are not subject to any meaningful guidance, oversight or review. This is, as Judge Evans noted in his dissent below, a recipe for political mischief. *See Crawford*, 472 F.3d at 955 (Evans, J., dissenting). Moreover, as set forth in the examples below, the impact of the unguided discretion provided in the Voter ID Law is not merely hypothetical but rather a very real concern to actual voters who have been or who risk being burdened with voting by provisional ballots.

A. The Voter ID Law Allows A Voter To Be Burdened With A Provisional Ballot Simply Because Of A Minor Misspelling Of His Or Her Name

The Voter ID Law's lack of any interpretive guidance concerning the meaning of the statutory term "conform" allows election officials to burden voters whose proofs of identification do not exactly match their name on the voting roll with a provisional ballot. The District Court suggested that differences involving missing or unneeded hyphens and spaces were mere "potential anomalies" that were likely "trivial." *Rokita*, 458 F. Supp. 2d at 836. This burden is not merely potential. The occurrence of trivial challenges has been acknowledged by the former chief election official of Marion County. Appendix to the Brief of the League of Women Voters as *Amici Curiae* (hereinafter "League Br. App.") 3-4, *Crawford v. Marion County Election Bd.*, 472 F.3d 949

(2007) (No. 06-2218, 06-2317). And, as the case of Janice Tingley makes clear, even a difference of one character in a name can prompt a challenge.

1. Janice Tingley Had To Vote Provisionally In The 2006 Election Because Her Last Name Was Misspelled By One Letter

When Janice Tingley tried to vote in the 2006 general election, she presented a proof of identification correctly showing her name as "Tingley." She was challenged and forced to cast a provisional ballot because her name on the voter registration record was spelled "Tengley." Thus, at least one election official believed that the difference between "Tingley" and "Tengley" was sufficiently significant for her proof of identification not to "conform" within the meaning of the Voter ID Law.

2. Tracy Heaton De Martinez, Kate Sweeney Bell And Cordelia Lewis-Burks Cannot Reliably Use Their Indiana Driver's Licenses To Vote Because They Contain Misspellings That Cannot Now Be Corrected

As is common elsewhere, Indiana citizens follow different conventions for family names, including the use of hyphenated and non-hyphenated composite family names. The apparent inability (or refusal) of the BMV to correct errors in names on driver's licenses, once issued, renders such licenses ineffective as proof of identification for purposes of avoiding the burdens of the Voter ID Law.

For example, as is common in certain Spanish-speaking cultures, when she married, Tracy Heaton de Martinez incorporated her maiden name and the name of her husband. While the Social Security Administration correctly noted this change, the BMV did not, instead eliminating the space between "de" and "Martinez" such that Ms. Heaton de Martinez received a driver's license bearing the name "TRACY HEATON DEMARTINEZ." When informed of its error, the BMV responded that it was unable to change her license. In contrast to her driver's license, the polling list identifies her as "TRACY HEATON DE MARTINEZ." League Br. App. 5-6. Because the name on her Indiana driver's license might well be seen as not "conform[ing]" to that on the voter list (even using the Indiana Election Division's guidance for defining the term "conform"), Ms. Heaton de Martinez's possession of a proof of identification cannot ensure that she can vote without being forced to cast a provisional ballot.

Similarly, Kate Sweeney Bell is incorrectly identified on her Indiana driver's license as "KATE E. SWEENEY-BELL," although Ms. Bell's legal name is not hyphenated. Like Ms. Heaton de Martinez, Ms. Bell has asked the BMV on more than one occasion to correct the error, but to no avail. Ms. Bell's name on her voter registration card appears as "KATHERINE E. SWEENEY BELL." League Br. App. 7-8. Without the hyphen, her name on the voter registration record may be seen by an election official or challenger as not "conform[ing]," strictly speaking, to the name on her driver's license, thus requiring a provisional ballot.

By contrast, following her marriage in 1999, Cordelia Lewis adopted a hyphenated last name and became Cordelia Lewis-Burks. The full name listed on Ms. Lewis-Burks's driver's license is correct. The name on her voter registration record, however, is "CORDELIA LEWIS BURKS." Although, as explained below, Indiana law allows a voter whose name has changed to correct his or her name on the voter registration record on Election Day, *see* Ind. Code § 3-7-41-2, Ms. Lewis-Burks nevertheless faces a possible challenge under the Voter ID Law even if she should change her name on the voter registration record.

B. The Voter ID Law Additionally Burdens Persons With Recent Name Changes

Although the Indiana Code allows voters to change their names on the voter registration record in the polling place on Election Day,[12] the ambiguity concerning the meaning of "conform" permits such voters' correction of their voting record to result in their having to vote by provisional ballot. The Indiana Election Division recognizes that whether a voter will have to vote a provisional ballot is for each precinct election board member and challenger

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[12] The Indiana Code provides:

> A voter who wishes to indicate that the voter's name has changed may also write the necessary information concerning the name change on the voter registration record under IC 3-11-8-25.1 before the person receives a ballot. The person may then vote if otherwise qualified.

Ind. Code § 3-7-41-2.

to determine. *See* League Br. App. 1-2. The unequal application of such discretion in seemingly indistinguishable cases is already apparent, as the contrasting experiences of Karen Webster and Anne Riciardelli illustrate.

1. Karen Webster's Provisional Ballot Was Not Counted Because She Did Not Appear Before The County Election Board

Karen Webster was married in October 2006 and sought to update her name information at the poll on Election Day a few weeks later in November 2006. Despite her fourteen-year history of voting at the same polling place in Marion County, as well as her presentation of her marriage certificate and new driver's license (each bearing her married name) to precinct officials, Ms. Webster was told that she could not then change her name on the voter registration record. Ms. Webster voted a provisional ballot that day but her vote was ultimately not counted because she did not later appear before the Marion County Election Board.

2. Anne Riciardelli Was Required To Cast A Provisional Ballot But Was Told She Did Not Have To Appear Before The County Election Board To Have Her Ballot Counted

Marion County voter Anne Riciardelli, like Ms. Webster, changed her name shortly before the election of November 2006. Ms. Riciardelli arrived at

the polling place with all of her new identification and yet was required to cast a provisional ballot. Unlike Ms. Webster, however, Ms. Riciardelli was advised that it was unnecessary for her to go before the election board and so her vote was ultimately counted while Ms. Webster's ballot was not.

There is no explanation as to why Ms. Riciardelli's and Ms. Webster's provisional ballots received different treatment.[13]

C. The Voter ID Law Allows Challenges On The Basis Of Perceived Discrepancies Between The Physical Appearance Of The Individual And The Physical Descriptors And Photograph On The Proffered ID

As noted, the Voter ID Law requires the proof of identification to "show[ ] a photograph of the individual to whom the document was issued." Ind. Code § 3-5-2-40.5(2). Thus precinct election board

[13] The different treatment of ballots exemplifies the different treatment afforded to voters, either intentionally or unintentionally. Another example is that of Jonathan Groth, a principal employed by the Porter County School Corporation, which has issued him a photo ID. Mr. Groth was unable to use his photo ID as proof of identification in the May 2007 election because the poll workers concluded his photo ID did not satisfy the requirements of the Voter ID Law as it did not contain an expiration date and was not issued by the State of Indiana or the United States. However, in the November 2007 election, with different workers manning the poll, Mr. Groth was allowed to vote using his school photo ID, even though it was not issued by either the federal or state government and contained no expiration date.

members and challengers are permitted to decide whether they are satisfied that the photo on the proof of identification is a photo of the prospective voter. The Voter ID Law provides no guidance in this regard. While the burden imposed by non-"conform[ing]" names may be restricted to individuals who change their names or who have been unable to correct spelling errors, nearly every voter may find himself or herself burdened by a perceived change in appearance.

This is increasingly so given that most Indiana driver's licenses issued after December 31, 2005, expire and must be renewed every six years. *See, e.g.*, Ind. Code § 9-24-12-1(c). People often change their appearance, whether voluntarily or through natural processes, especially over a six-year period. They change hair color. They gain or lose weight. They grow facial hair or shave it off. They wear glasses or switch to contact lenses or vice versa or get laser surgery so that they no longer need glasses or contacts. They get sick and their physical appearance changes. The Voter ID Law makes such changes to appearance fair game for a challenge at the polling place.

For example, James E. Lingenfelter, Jr. is shown in the photo on his Indiana driver's license without any facial hair but he often sports a goatee and moustache. League Br. App. 13. Indianapolis voter Mary Ann Nowlin's driver's license states that she is a brunette but sometimes she is blonde; the weight on Ms. Nowlin's driver's license is approximately 50 pounds less than what Ms. Nowlin actually weighs;

and, she is wearing glasses in her driver's license photo but now nearly always wears contact lenses. League Br. App. 15-16. Cordelia Lewis-Burks is shown in her driver's license photo with red hair; however, her hair color is identified as "brown" on her driver's license. League Br. App. 10.

As is shown by each of the foregoing examples of typical changes in appearance, the Voter ID Law improperly affords discretion to election workers, including politically appointed challengers, to require almost any voter to cast a provisional ballot and to appear before the county election board within the next ten days for the simple reason that he now appears—whether objectively or even just subjectively to the election worker—different from the way he did when his proof of identification was issued. Indeed, since personal appearance can be a sensitive issue, the Voter ID Law may discourage some voters from even trying to vote simply to avoid what they perceive as the embarrassment or humiliation of having their current personal appearance evaluated against their likeness on their identification. The Constitution does not permit such arbitrariness to interfere with the fundamental right to vote.

CONCLUSION

For the foregoing reasons, the League respectfully requests that the Indiana Voter ID Law be declared unconstitutional under the First and Fourteenth Amendments. Alternatively, the League requests that the decision of the Seventh Circuit be vacated and the case remanded to the District Court for further proceedings.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF UNITED STATES SENATORS MITCH McCONNELL, ROBERT BENNETT, CHRISTOPHER S. "KIT" BOND AND UNITED STATES REPRESENTATIVES ROY BLUNT, LAMAR SMITH AND VERNON EHLERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS [FEDERAL PREEMPTION AND THE FEDERAL HELP AMERICA VOTE ACT]

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INTEREST OF *AMICI*[1]

Amici are current members of Congress who have significant interest in the resolution of the issue before the Court. Specifically, the *amici* were members of the 107th Congress involved in passage of The Help America Vote Act of 2002 ("HAVA").[2] The *amici* include the Ranking Members of the Committees of the House and Senate with jurisdiction of legislation related to federal elections and members of the Conference Committee created by the two Houses of the 107th Congress to resolve differences between the version of legislation that the House and Senate passed which became The Help America Vote Act of 2002.

HAVA contains minimum election administration requirements with which each State must comply. Congress intended HAVA to supplement, not supplant, the States' election administration requirements, including protections against vote fraud that are more strict than the requirements established by HAVA.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth

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[1] Letters of consent by the parties to the filing of briefs by *amici* have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, no counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] 42 U.S.C. §§ 15301-15545 (2006).

of Kentucky and the Senate Republican Leader. He also is the former chairman and ranking member, and is a current member, of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation and conducting hearings related to federal elections. Leader McConnell presided over numerous hearings on election reform issues, including issues of voter fraud and securing the franchise of every American by combating vote dilution through fraudulent voting. He was the lead Senate sponsor of numerous bipartisan election reform bills and managed the passage of S. 565 on the Senate floor. He was the lead Senate Republican on the congressional Conference Committee on S. 565 and H.R. 3295 and, as such, was involved with the negotiation, compromise and agreement that became the Help America Vote Act of 2002, which passed overwhelmingly in both the House and the Senate and was signed into law by the President.

United States Senator Robert F. Bennett is a Senator from the State of Utah. He is currently the Ranking Member of the Senate Committee on Rules and Administration, which has jurisdiction over, and has conducted numerous hearings on, the conduct of federal elections. During the 107th Congress, Senator Bennett was a member of the Senate Committee on Homeland Security and Governmental Affairs, which closely examined federal election procedures and practices in the aftermath of the 2000 presidential election. Senator Bennett is committed to ensuring

that the federal election system is free of irregularities and fraud and is administered in an open, equitable, and honest manner.

United States Senator Christopher S. "Kit" Bond is the senior United States Senator from Missouri. Prior to his election to the United States Senate, Senator Bond was twice elected Governor of the State of Missouri. Senator Bond played a central role in the drafting, negotiation, debate and passage of the Help America Vote Act of 2002. Senator Bond was one of the five Senators on the congressional Conference Committee that negotiated a compromise and agreement on S. 565 and H.R. 3295.

United States Representative Roy Blunt represents the Seventh District of Missouri and currently serves as the Republican Whip in the U.S. House. Prior to his election to Congress, Representative Blunt served as the Secretary of State of Missouri from 1984 to 1992 and was Missouri's chief election official for a number of elections, including four national elections. Representative Blunt has been involved in a variety of legislative efforts regarding election reform since being elected to the House in 1997 and continues to do so in his current role as the Republican Whip in the House of Representatives. Representative Blunt believes that the final authority for conducting elections is reserved for the individual state governments; however, after witnessing the problems associated with the 2000 election he and others in the Congress believed the integrity of the state electoral processes could be threatened if the

federal government did not move to assist States that wanted to modernize their voting systems. One of those initiatives was H.R. 3295, the Help America Vote Act of 2002 (HAVA). HAVA passed Congress and was signed into law while Representative Blunt served in leadership as the Chief Deputy Whip for the majority. Representative Blunt served as a conferee appointed by the Speaker for the consideration of the House bill and Senate amendments, and modifications committed to conference on the bill, and signed the final conference report (House Report 107-730) for the bill. Representative Blunt was involved in the negotiations resulting in the passage of HAVA and joins as an *amici* to ensure that Congress's intent in passing this important national legislation and the legislative history of HAVA is provided to the Court by those that were directly involved.

United States Representative Vernon J. Ehlers represents the Third District of Michigan. He was the former Chair and currently serves as Ranking Member of the Committee on House Administration. The Committee on House Administration is the committee of jurisdiction for proposed legislation related to federal elections. As a member of the House Administration Committee in the 107th Congress, Representative Ehlers served on the Conference Committee that negotiated the Help America Vote Act of 2002 (HAVA), and is the only current member of the Committee on House Administration who served on the Committee when HAVA was drafted and enacted. Prior to running for Federal Office, Representative

Ehlers served eight years on the Kent County Board of Commissioners where he worked with County, City and Township Clerks on state and local election administration issues. Representative Ehlers is committed to ensuring that every eligible citizen has the right to vote, and that their vote is being accurately counted and not diluted by illegal or improper votes.

United States Representative Lamar Smith is a Member of the United States House of Representatives who represents the 21st District of Texas. He supported passage of the Help America Vote Act as a Member of the House Committee on the Judiciary. Representative Smith is now Ranking Member of the House Judiciary Committee.

In addition to these Members of Congress, a number of other Members have joined in support of *amici*. These other Members are noted in Appendix A.

SUMMARY OF THE ARGUMENT

Article I, § 4, of the United States Constitution delegates to the States broad power to regulate the conduct of federal elections. To ensure that such elections are fair and honest and that all eligible citizens have an opportunity to cast a ballot that is fairly and accurately counted, the States, in exercising their authority under Section 4 of Article I, may enact laws and regulations that protect the integrity of the election system by preventing vote fraud.

The United States Congress passed The Help America Vote Act of 2002 ("HAVA") with the purpose of enhancing the ability of all eligible citizens to cast their ballots and have them counted accurately, while also putting in place strong safeguards against vote fraud. That is, Congress sought to make it "easy to vote but tough to cheat." HAVA included several provisions designed to protect eligible voters from having their votes canceled out by fraudulent or illegally cast ballots, including a requirement that individuals who registered by mail and are first-time voters in a State must provide proof of identity before voting. This voter identification provision is designed to protect against vote fraud committed by means of mail-in voter registration forms.

With the passage of HAVA, Congress established minimum requirements for administering federal elections but made clear that States could enact laws and regulations that are stricter than those in HAVA. In other words, HAVA's requirements serve as a "floor," not a "ceiling."

The statutory language and the legislative history make clear that Congress intended HAVA's anti-fraud provisions to supplement, not supplant, state laws designed to protect the integrity of elections. Thus, States are free to pass new laws or retain existing ones with stronger anti-fraud provisions, including broader voter identification requirements, than those included in HAVA.

ARGUMENT

(1) The United States Constitution Grants Broad Authority to States To Enact Procedures To Prevent Vote Fraud

"[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (internal quotes omitted). The framers of the Constitution recognized the impracticality of inserting a comprehensive election code into the text of the Constitution and, thus after much debate, agreed to have the States be primarily responsible for regulating the conduct of federal elections, while granting Congress the authority to modify these regulations as it deemed necessary.[3] Therefore, the United States

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[3] It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention.

The Federalist No. 59, 384 (Alexander Hamilton) (Modern Library Coll. Ed. 1937).

Constitution directs the States to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and for Representatives." U.S. Const. Art. I, § 4, cl. 1.

The Court has found that the States, in exercising their power under Section 4 of Article I, possess the authority to enact election regulations "not only as to times and places, but in relation to . . . prevention of fraud and corrupt practices" so as to "enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). As this Court noted in *United States v. Classic*, 313 U.S. 299, 329 (1941), "[f]ree and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity." Therefore, "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989).

This Court has repeatedly made clear that vote fraud threatens the democratic process and undermines the confidence the American people have in the federal government. For instance, in *Ex parte Yarbrough (The Ku-Klux Cases)*, 110 U.S. 651, 666 (1884), the Court declared,

> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source

> of danger. . . . Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.

More recently, this Court noted,

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Purcell v. Gonzalez, 549 U.S. ___, ___, 127 S. Ct. 5, 7 (2006) (per curiam), quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). For these reasons, the Court has construed Article I, § 4, broadly to provide States wide latitude in devising procedures to prevent vote fraud.

(2) When Congress Adopted HAVA, It Intended To Supplement, Not Supplant, State Safeguards That Protect Against Vote Fraud[4]

(a) Congress Recognized That Vote Fraud is a Serious Problem and Enacted Several Provisions To Address This Problem

The conduct of the 2000 presidential election spurred Congress to take a comprehensive look at the nation's election system. Beginning in early 2001, both Houses of Congress held numerous hearings to examine all facets of the election system, including issues relating to voting technology, voter registration, and election integrity.[5] At the same time, former Presidents Gerald Ford and Jimmy Carter co-chaired a bi-partisan commission (The Commission on Federal Election Reform) that investigated the conduct of federal elections and ultimately issued a report recommending several changes to how elections were

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[4] According to the National Conference of State Legislatures, "Twenty-four states have broader voter identification requirements than what HAVA mandates." *Requirements for Voter Identification*, Nat'l Conf. of State Legislatures (Feb. 1, 2007) at http://www.ncsl.org/programs/legismgt/elect/taskfc/VoterIDReq.htm.

[5] *See, e.g., Field Hearing in Atlanta, Georgia to Receive Testimony on Election Reform Before the Senate Committee on Rules and Administration*, 107th Cong. (2001); *Hearing on Federal Election Practices and Procedures Before the Senate Committee on Governmental Affairs*, 107th Cong. (2001); *Hearing On Federal Election Reform Before the House Committee on House Administration*, 107th Cong. (2001).

being administered in this country.[6] These efforts culminated in the passage of The Help America Vote Act of 2002 ("HAVA"),[7] which was passed by overwhelming bi-partisan majorities in both Houses of Congress.[8]

The goal of HAVA was to "make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (2002) (statement of Sen. Bond). In other words, "Every American citizen – appropriate age, appropriate qualifications, properly registered – ought to be able to cast a ballot without difficulty. They also ought to be able to do that only once." *Id.* at S710 (statement of Sen. Bond); *see also id.* at S2527 (statement of Sen. Dodd) ("All of us worked many months to develop legislation that would try to meet one central goal; that was to make it easier to vote in America and much harder to corrupt our Federal election system."); *id.* at S2527 (statement of Senator McCain)

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[6] President Bush noted the role of the Carter-Ford Commission's recommendations in the development of HAVA. "The commission that helped inspire this legislation was led by two exceptional Americans, with broad experience in public service: our 38th and 39th President – Presidents. Although Gerald Ford and Jimmy Carter could not be here today, our nation is grateful for their work on election reform and for all they have given to America." Remarks by President at Signing of H.R. 3295, The Help America Vote Act of 2002, October 29, 2002.

[7] 42 U.S.C. §§ 15301 through 15545 (2006).

[8] The House passed HAVA by a vote of 357-48 on October 10, 2002. 148 Cong. Rec. H7853-54 (2002). Then on October 16, 2002, the Senate approved HAVA by a margin of 92-2. *Id.* at S10515.

(Congress "included provisions that would both include mandatory Federal standards to make the election process easier for legitimate voters and prevent voter fraud."). Thus, HAVA was carefully crafted to enhance the ability of each eligible citizen to cast a ballot and have that ballot counted, while also putting in place strong safeguards to protect against efforts to corrupt the election system through fraud.

As HAVA was being developed, Congress recognized that any comprehensive election reform legislation had to include strong anti-fraud provisions because "illegal votes dilute the value of legally cast votes – a kind of disenfranchisement no less serious than not being able to cast a ballot." *Id.* at S10488 (statement of Sen. Bond); *see also Hearing on H.R. 3295 "Help America Vote Act of 2001" Before the House Judiciary Comm.* 107th Cong. (Dec. 5, 2001), *available at* 2001 WL 1552086 (F.D.C.H.) (statement of Rep. Sensenbrenner) ("The basic principle of 'one person, one vote,' one that crosses party lines for voting, is not a partisan issue, it is an American issue. All Americans want to know that the vote they cast, for the candidate of their choice, will be counted fairly and accurately. But, it is also the concern of a great many Americans that widespread voter fraud is discounting or 'canceling' out the value of their legally cast vote."). Consequently, HAVA contains several provisions designed to curb vote fraud. *See* 148 Cong. Rec. S10419 (2002) (statement of Sen. McConnell) ("To protect the integrity of every election, this

conference report makes significant advancements in rooting out vote fraud. Congress has acted properly to curtail fraudulent voting and reduce duplicate registrations. . . . The provisions of this bill are carefully drafted to address this impediment to fair and honest elections, and we provided the States with the means and the resources to address this problem.").

First of all, HAVA requires each State to establish and maintain a centrally administered statewide voter registration database to ensure clean voter lists that are free of duplicate names and ineligible and fictitious persons. 42 U.S.C. § 15483(a)(1)(A). Moreover, to protect against the submission of fraudulent voter registration forms, HAVA mandates that each individual who registers to vote must include on his or her registration form a driver's license number or, if the individual does not have a driver's license, the last four digits of his or her Social Security number; if the individual lacks either number, the State shall assign that individual a unique identifier. *Id.* § 15483(a)(5). HAVA further protects against voter registration fraud by requiring voters who are registering (1) by mail and (2) for the first time in the State to provide a current valid photo identification, or, in the alternative, "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." *Id.* § 15483(b)(2)(A)(ii).

According to Senator Mitch McConnell,

> These three provisions [statewide voter registration databases, driver's license number on voter registration form, and voter ID requirement for first-time voters who register by mail] will ensure that dogs . . . will no longer be able to register and vote. These provisions will ensure that our dearly departed will finally achieve everlasting peace and will not be troubled with exercising their franchise every 2 years. And importantly, the provisions will ensure that voter rolls will be cleansed and protected against fraudulent and duplicate registrations.

148 Cong. Rec. S10419 (2002).

With respect to HAVA's anti-fraud provisions, Senator Kit Bond succinctly stated, "[b]y passage of this legislation, Congress has made a statement that vote fraud exists in this country." *Id.* at S10489.

(b) The HAVA Voter Identification Provision Targets the Problem of Vote Fraud Committed By Means of Mail-in Voter Registration Forms

Congress included in HAVA the requirement for first-time voters who register by mail to provide proof of identity before voting to remedy the problem of inflated and inaccurate voter lists – a problem significantly exacerbated by "the abuse of mail registration cards." 148 Cong. Rec. S10489 (2002) (statement of Sen. Bond). Senator Bond, the primary

author of the voter identification provision,[9] explained why this requirement is so important: "[T]he identification provision . . . [is] necessary to guarantee the integrity of our public elections and to protect the vote of individual citizens from being devalued by fraud. Every false registration and every fraudulent ballot cast harms the system by canceling votes cast by legitimate voters. It undermines the confidence of the public that their vote counts and therefore undermines public confidence in the integrity of the electoral process." *Id.*

The problem that voter identification provisions are designed to resolve is not a theoretical one. During the floor debate on HAVA, Senator Bond urged Congress to consider the experience of his

> home State of Missouri, [where] there is abundant evidence of [mail registration] cards being used for the purpose of getting phony names, the names of the deceased and even the names of pets on voter rolls. Someone even registered the deceased mother of

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[9] See 148 Cong. Rec. S10419 (statement of Sen. McConnell) ("[F]irst-time voters who register by mail will have to confirm their identity at some point in the process by photo identification or other permissible identification. This provision was championed by Senator Bond."); *id.* at S10501 (statement of Sen. Dodd) ("We also include provisions which Senator Bond insisted on in terms of responsibility. We are going to make sure we do our best to see to it that people who register to vote are who they say they are, so we don't have people registering fictitious people and casting ballots for them. To Senator Bond's credit, we worked very hard on that.").

> the prosecuting attorney of the City of St. Louis. Names have been registered to drop-houses, businesses, union halls, Mailbox Etc. and vacant lots. From there the people behind the fraud can request an absentee ballot in the name of the voter or attempt to go to the polls and cast a vote under the assumed name.

Id.; *see also Hearing on H.R. 3295 "Help America Vote Act of 2001" Before the House Judiciary Comm.* 107th Cong. (Dec. 5, 2001), *available at* 2001 WL 1552086 (F.D.C.H.) (statement of Rep. Sensenbrenner) ("Part of this problem can be attributed to the significant inaccuracies which exist with the voting rolls. For instance, in Michigan, they discovered one million duplicate registrations when they audited their voter rolls. It has been reported that Philadelphia has the same number of registered voters as there are voting age people living in the city. And in Los Angeles County, it is estimated that 25% of all voter registrations have problems or incorrect information.").

To further underscore the seriousness of the problem, Senator Bond listed the names of a select few voters who had registered via mail-in card: "Barnabas Miller of California, Parker Carroll of North Carolina, Packie Lamont of Washington, D.C., Cocoa Fernandez of Florida, Holly Briscoe of Maryland, Maria Princess Salas of Texas and Ritzy Mekler of Missouri. They are a new breed of American voter. Barnabas and Cocoa are poodles. Parker is a Labrador. Maria Princess is a Chihuahua, Holly is a Jack Russell Terrier, and Ritzy is a Springer-Spaniel." 148 Cong. Rec. S10488 (2002).

Senator Bond concluded, "Now, I like dogs . . . , but I don't think we should allow them to vote. . . . If your vote is canceled by the vote of a dog . . . , it is as if you did not have a right to vote." *Id.*

(c) Congress Expressly Contemplated States Retaining or Adopting Additional Measures To Prevent Vote Fraud and Intended HAVA To Serve as a "Floor," Not a "Ceiling"

The HAVA provisions designed to prevent vote fraud through the abuse of fictional mail-in registrations and subsequent mail-in absentee ballots were not intended to prevent States from adopting additional measures to protect the integrity of the election process. To the contrary, Congress expressly considered, both in HAVA itself and in the legislative history, that States would retain or enact laws and regulations that went further than those included in HAVA. Thus, Congress intended HAVA's voter identification requirement for first-time mail-in registrants, as well as the other anti-fraud provisions included in the bill, to serve as a "floor," not a "ceiling."

Congress unequivocally states in HAVA that the bill's requirements function as a baseline and that States are free to pass even stronger protections.[10] The statute itself makes this clear.

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[10] A Commission co-chaired by former President Jimmy Carter and former Secretary of State James Baker was convened after the 2004 presidential election. This Commission was

(Continued on following page)

Section 15484 of the statute reads that its requirements "are *minimum requirements*" and that HAVA shall not be construed "*to prevent a State from establishing* election technology and *administration requirements that are more strict than the [Federal] requirements* . . . so long as such State requirements are not inconsistent with the Federal requirements. . . ." 42 U.S.C. § 15484 (emphasis added). Thus, the statute is unambiguous in expressing that States may adopt requirements stricter than those in HAVA.

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the successor to the Carter-Ford Commission, see *supra* note 6, and included many of the same members. The Carter-Baker Commission proposed a number of recommendations for further post-HAVA election reform, including a recommendation advocating voter identification requirements.

> To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), a photograph, and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to non-drivers free of charge.

Final Report of the Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (Sept. 2005) at 18-21. Thus, the Carter-Baker Commission members (again, many of whom had been members of the Carter-Ford Commission, and whose efforts significantly contributed to the ultimate passage of HAVA) clearly understood that HAVA did not limit the States' ability to enact requirements more stringent than those in HAVA.

Furthermore, the legislative history makes entirely clear that Congress contemplated and approved of state anti-fraud measures that are more robust than those in HAVA. With regard to the voter identification provision, Senator Bond stated,

> The conferees recognize that many States have taken steps to address fraud. *A number of those steps may go beyond that set in this bill.* It is the agreement of the conferees that *this bill in no way limits the ability of the states from taking steps beyond those required in this bill.* For instance, several States require those who register by mail to vote in person the first time they vote. This bill does not limit a State from taking this additional step to address fraud. *Each of the steps taken in this bill to address fraud shall be considered to be a minimum standard.*

148 Cong. Rec. S10490 (2002) (emphasis added).

Congress's understanding that HAVA established minimum requirements that the States may exceed is spelled out with respect to other anti-fraud provisions in HAVA as well. For example, the States may require more information on a voter registration form than is required under § 15483(a)(5) of HAVA (requiring a voter registration form to contain either a registrant's driver's license number or, if the registrant does not have one, the last four digits or the registrant's Social Security number).[11] "It is important to note that

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[11] *See* "SPECIAL RULE FOR CERTAIN STATES. – In the case of a State which is permitted to use social security numbers, and

(Continued on following page)

states that utilize full social security numbers for voter registration applicants can continue to do so after passage of this legislation. This new registration requirement is a minimum standard. If a state requires applicants to provide more information – such as their entire nine-digit social security number – this legislation will not override that state requirement. . . . We have seen that States that require additional identifying information from registrants have substantially fewer duplicate and fraudulent registrations on their voter rolls." 148 Cong. Rec. S10490, S10492-93 (2002) (statement of Sen. Bond).

Furthermore, with regard to state laws governing who may "challenge" a suspected fraudulent voter, "[I]f State law permits the challenge of provisional voters by someone other than election officials, this legislation [HAVA] does not prevent that particular State practice." *Id.* at S10493 (statement of Sen. Bond).

In short, when it enacted HAVA, Congress specifically expressed that the bill's mandates would be "minimum requirements," and that States were permitted to pass new laws or retain existing ones with even stronger anti-fraud provisions, including more robust voter identification requirements. The statutory language and the legislative history make this fact abundantly clear.

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provides for the use of social security numbers, on applications for voter registration, . . . the provisions of this paragraph shall be optional." 42 U.S.C. § 15483(a)(5)(D).

CONCLUSION

As the discussion above clearly shows, when Congress adopted HAVA, it intended to supplement State laws designed to combat vote fraud, not supplant them. The HAVA voter identification requirements are, as the statute expressly states, *minimum* requirements. The requirements in HAVA serve as a "floor," not a "ceiling," and States are free to adopt election regulations that go beyond the minimum requirements set forth in HAVA.

Respectfully submitted,

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28. **Joe Pitts (PA-16)**
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31. **John Shadegg (AZ-3)**
32. **Mark Souder (IN-3)***
33. **Dave Weldon (FL-15)**
34. Lynn Westmoreland (GA-3)
35. **Joe Wilson (SC-2)**

NOTES:

Members in **bold** were also Members during the 107th Congress.

Members in *Italics* were also Secretaries of State

Members with * are from Indiana

AMICUS CURIAE BRIEF

Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, et al.,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, et al.,
Respondents,
&
INDIANA DEMOCRATIC PARTY, et al.,
Petitioners,
v.
TODD ROKITA, INDIANA SECRETARY OF STATE, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF has represented Latino and minority interests in voting and civil rights cases in the federal courts, including before this Court in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006). MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

Voter identification schemes such as the one at issue here substantially burden the rights of minority voters, including Latino voters. MALDEF thus agrees with petitioners that Indiana's voter identification statute unconstitutionally infringes upon the fundamental right to vote. We write separately, however, to bring to the Court's attention the existence of similar voter identification schemes, especially the one currently being challenged in Arizona, which are racially motivated and which substantially burden the voting rights of minority citizens, in order to illustrate why this Court should be especially skeptical of *any* voter identification law, in-

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[1] The parties have given their written consent to the filing of this brief. In accordance with Rule 37.6, counsel for *amicus curiae* state that no counsel for either party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

cluding Indiana's scheme.

MALDEF represents the lead plaintiffs in a separate lawsuit challenging the constitutionality of the Arizona Taxpayer and Citizen Protection Act, a 2004 voter initiative known as "Proposition 200." Under Proposition 200, Arizona residents, like the Indiana residents involved in this case, are required to provide specified proof of identification before voting at the polls on Election Day. *See* Ariz. Rev. Stat. Ann. § 16-579; *see generally Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). Proposition 200 shows that the substantial voting rights burdens imposed by voter identification schemes cannot be justified by any compelling state interest and should be rejected.

SUMMARY OF ARGUMENT

As the Latino and Native American experiences under Proposition 200 show, the application of strict scrutiny is necessary to ensure that voter identification schemes ostensibly based on the need to police voting fraud are not a subterfuge for outright discrimination. Like some prior laws limiting voting rights, *see Perry*, 126 S. Ct. at 2622, Proposition 200 was enacted amidst a racially-charged debate strongly suggesting that the statute was motivated by discriminatory animus—a suggestion that has yet to be countered by evidence of actual fraud to justify the law. *See infra* at 9-14.

Aside from the animus that drove its enactment, Proposition 200 also confirms that voter identification laws disproportionately burden poor and minority communities, placing bureaucratic obstacles before many individuals who are unlikely to overcome them and increasing the cost of voting for those who can least afford it. *See infra* at 1-9. Accordingly, and

contrary to the conclusion of the court of appeals in this case, state voter identification laws impose real—indeed, substantial—burdens on the voting rights of thousands of individuals. Those burdens cannot be justified by the asserted but wholly unproven need to combat voting fraud.

The striking similarities between voter identification laws and the poll taxes this Court rejected less than half a century ago demonstrate that identification requirements are unconstitutional regardless of the level of scrutiny the Court applies. Nevertheless, voter identification requirements should be subject to the same searching scrutiny this Court historically has applied to statutes that target the franchise.

Although voter identification schemes such as the Indiana law at issue here are unconstitutional generally, Proposition 200 itself demonstrates how some of these statutes can be particularly discriminatory and burdensome. Accordingly, even if this Court upholds the Indiana scheme, it should do so narrowly in order to permit lower courts to reject the discriminatory identification and registration schemes that exist in states such as Arizona.

ARGUMENT

I. The Voter Identification Requirements Adopted By Indiana And Other States Operate As Poll Taxes Targeted At Poor And Minority Voters.

A. Voter Identification Statutes Impose Significant Burdens On The Franchise.

This Court has long recognized that the Constitu-

tion "restrains the States from fixing voter qualifications which invidiously discriminate," *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966), and that "close constitutional scrutiny," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), must apply to laws restricting the right to vote. Although the specific provisions of existing voter identification laws vary from state to state, *see* Ind. Code § 3-11-8-25.1; Act of April 22, 2005 No. 53, § 59, 2005 Ga. Laws 295; Mo. Ann. Stat. § 115.427; Ariz. Rev. Stat. Ann. § 16-579, a common thread runs through these newly-established regimes: in order to vote, a citizen must overcome a series of financial or bureaucratic obstacles before casting a ballot on Election Day. Those financial and bureaucratic burdens fall most profoundly on many individuals who are least equipped to bear them. For these individuals, who are disproportionately low income and minority citizens, voter identification laws limit access to the polls, thereby disenfranchising a substantial number of otherwise eligible voters. Accordingly, these statutes serve as modern–day poll taxes that impermissibly condition the right to vote on the payment of money or the successful navigation of "onerous procedural requirements." *Harman v. Forssenius*, 380 U.S. 528, 541 (1965) (citation omitted).

Proposition 200, in particular, imposes a substantial burden on the rights of Arizonans to vote. The initiative was adopted in November 2004 based on assertions "that illegal immigration is causing economic hardship to th[e] state" and that "illegal immigrants have been given a safe haven in [Arizona]" in conflict with "federal immigration policy." Arizona 2004 Ballot Propositions: Proposition 200,

available at http://www.azsos.gov/election/2004/info/PubPamphlet/Sun_Sounds/english/prop200.htm. It requires individuals (1) to present "satisfactory evidence of United States' citizenship" in order to *register* to vote, and (2) to present specified forms of identification in order to vote at the polls. Arizona 2004 Ballot Propositions: Proposition 200 §§ 4, 5; *see* Ariz. Rev. Stat. Ann. §§ 16-166(F); 16-579(A); 46-140.01(A), (B). With respect to the latter requirement, Arizona electors must present one form of identification (typically an unexpired Arizona driver's license) that includes the elector's photograph, name, and address, or two "secondary" documents that bear the elector's name and address (but need not include a photograph), such as a utility bill and a bank statement. Ariz. Rev. Stat. Ann. § 16-579(A); Office of the Sec'y of State, Ariz. Sec'y of State Election Procedures Manual 113 ("Election Manual"), *available at* http://www.azsos.gov/election/Electronic_Voting_System/.[2]

In several important respects, Proposition 200 is even more restrictive than the Indiana law at issue here. First, unlike Indiana law, Arizona law does not exempt from coverage residents of nursing

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[2] Acceptable secondary documents include: (1) a utility bill of the elector (for electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television), dated within ninety days of the date of the election; (2) a bank or credit union statement that is dated within ninety days of the date of the election; (3) a valid Arizona Vehicle Registration; (4) an Indian census card; (5) a property tax statement of the elector's residence; (6) a Tribal enrollment card or other form of tribal identification; (7) a vehicle insurance card; (8) a Recorder's Certificate; (9) a valid United States federal, state, or local government issued identification, including a voter registration card issued by the county recorder. Election Manual at 113–14.

homes or indigent electors—two segments of the population for whom the identification requirements are likely to be particularly burdensome. *Compare* Ariz. Rev. Stat. § 16-579(A); Election Manual at 113 (no exceptions to identification requirement), *with* Ind. Code §§ 3-10-1-7.2(e); 3-11-8-25.1(e) (dispensing with identification requirement for those who live and vote at a state-licensed care facility) *and* Ind. Code. §§ 3-10-1-7.2(d), 3-11-8-25.1(d), 3-11.7-5-2.5(c)(1) through (2) (allowing a voter to cast a provisional ballot and then return to execute an affidavit swearing that he is unable to obtain proof of identification due to indigence).

Second, although both Arizona and Indiana allow electors to cast provisional ballots and later return with identification, the Arizona scheme provides a significantly shorter grace period. *Compare* Ind. Code § 3-11.7-5-2.5(a) (giving voters ten days in which to appear before the circuit court clerk or county election board to present photo identification or execute affidavit explaining inability to do so on grounds of indigence or religious objection) *with* Election Manual at 120 (providing as little as three days to present approved identification to county recorder).[3] That distinction has important conse-

[3] Citing Ariz. Rev. Stat. Ann. § 16-584, the *Crawford* petitioners state that, if an Arizona voter lacks acceptable identification, she may cast a conditional provisional ballot and "it is the county recorder who is tasked with the duty of verifying the voter's eligibility by comparing his or her signature to the signature on the voter rolls, and no further action is therefore required of the voter." Brief of Petitioner William Crawford at 31-32 n.15. Eligibility review pursuant to § 16-584 occurs, however, only after the elector has provided the requisite identification. Ariz. Rev. Stat. Ann. § 16-579(A); Election Manual

quences for the voting rights of certain minority citizens. *See* The Eagleton Institute of Politics et al., *Report to the U.S. Election Assistance Commission on Best Practices to Improve Provisional Voting Pursuant to the Help America Vote Act of 2002, Public Law 107-252* 7 (June 28, 2006) ("States that provided more time to evaluate provisional ballots counted a greater proportion of those ballots.").

Indeed, Proposition 200 has already taken an immediate and substantial toll on voting rights in Arizona. For example, fourteen of the fifteen Arizona counties reported after the 2006 election that approximately 2,500 individuals went to polling stations but left without voting. David Kravets, *Judges Debate Arizona Voter ID Rule*, Associated Press, San Francisco (Jan. 8, 2007).[4] These results are unsurprising, given the tedious process residents must undertake to vote under Proposition 200. First, individuals who lack the requisite identification documents in advance of Election Day must pay anywhere from $10 to $380 to obtain them, depending on whether they seek a driver's license ($10-$25), a non-operating identification license ($12), *see* Ariz. Dep't of Transp., Frequently Asked Questions, http://www.azdot.gov/mvd/faqs/scripts/faqs.asp?secti

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at 115, 120. Accordingly, if the elector does not return after the election with identification, her conditional provisional ballot will not be counted. *Id.*

[4] As noted in *amicus'* statement of interest, litigation over Proposition 200 is ongoing, and, as a consequence, a record detailing the history and impact of that initiative is still being developed. As explained *infra*, Section III, therefore, *amicus* respectfully requests that this Court leave room for lower courts to invalidate the Arizona scheme, even if it concludes the Indiana scheme is constitutional.

on=dl#4 (last visited Nov. 9, 2007), or also require a birth certificate ($10), *see* Ariz. Dep't of Health Servs., *Birth Certificates: Applying for a Certified Copy of a Birth Certificate in Person*, http://www.azdhs.gov/vitalrcd/apply_birth_in_person.htm (last visited Nov. 9, 2007), a passport ($97), *see* U.S. Dep't of State, *Passport Fees*, http://travel.state.gov/passport/get/fees/fees_837.html (last visited Nov. 9, 2007), or a replacement naturalization certification (now $380), *see* U.S. Citizenship & Immigration Serv., Form N-565, *available at* www.uscis.gov/files/form/N-565.pdf, necessary to prove identity in order to obtain the license itself. As explained in greater detail below, such costs are both substantial and particularly burdensome on minorities, including Latino and Native American voters, who are among the poorest citizens in the state.

Second, the cost of these documents alone says nothing of the time and effort it takes to obtain them. To purchase a driver's license, one must travel to an office of the Arizona Motor Vehicle Division—a trip that can take several hours for those who live in one of Arizona's larger, rural counties, and may take an entire day for those who live within an Indian reservation. The statutory requirements are especially taxing on Arizona's Native American population, many of whom were born at home, do not drive, do not travel internationally, and, as a consequence, lack any driver's license or the birth certificate or passport which may be necessary to obtain one. *See* Ariz. Dep't of Transp., *Identification Requirements, Form 96-0155 R08/07, available at* http://mvd.azdot.gov/mvd/FormsandPub/mvd.asp (Search for "96-0155" in the "Form Number" search

box).

There is thus no serious question that the process of obtaining and paying for the required documentation "necessarily entails . . . a significant degree of advance planning by the voter before the election," placing a substantial burden on the right to vote. *Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes*, 506 F. Supp. 2d 598, 637 (D.N.M. 2007) (invalidating voter identification requirement adopted by City of Albuquerque); *cf. Harman*, 380 U.S. at 541 (outlawing "cumbersome procedure" individuals were required to navigate six months before the election). Moreover, the difficulties of obtaining and paying for those required documents are shouldered disproportionately by minority voters.

B. Voter Identification Laws Often Arise In The Context Of Racially-Charged Debates.

Whatever considerations may have motivated enactment of the Indiana statute at issue in this case, it is clear that other voter identification statutes have been unquestionably motivated by overt and impermissible racial animus. In Arizona, for example, although Proposition 200 was ostensibly designed to curb and penalize undocumented immigration, debate over the initiative revealed a broader, anti-Latino sentiment that drove its enactment. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (finding it "difficult to believe" that appellants had "seriously advanced" argument that popular initiative had no racial overtones where, "despite its facial neutrality[,] there [wa]s little doubt that the initiative was effectively drawn for racial purposes"). The statements made and actions

taken by the individuals who led the charge for Proposition 200, the corresponding racism of a concurrent congressional campaign, and the response of the Arizona public, as detailed in the local media, make clear that it was not anti-undocumented-immigrant, but rather anti-Latino, animus that drove the law. *See Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-197 (2003) ("[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative."); *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 268 (1977) (describing as "highly relevant" to the question of discriminatory intent the "legislative or administrative history" of an action, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports"). That animus is confirmed by the failure of states like Arizona to offer any evidence of the fraud claimed to justify such a significant burden on voting rights.

1. The Leaders Of Proposition 200 Exhibited Discriminatory Animus.

Illustrative of the discriminatory intent that has motivated many voting restrictions, *see Harman*, 380 U.S. at 543, the group that initiated and spearheaded the campaign to place Proposition 200 on the ballot, Protect Arizona Now ("PAN"), chose as its national adviser a self-described "separatist" who, upon her selection, explained to the Arizona media her belief that "each ethnic group is often happier with his own kind." *See* Ignacio Ibarra, *Prop. 200's Potential*

Impact Clear — As Mud, Arizona Daily Star (Oct. 17, 2004) *available at* http://www.amren.com/mtnews/archives/2004/10/prop_200as_pote.php; Yvonne Wingett, *Protect Arizona Now Adviser Denies Racism Charge*, The Arizona Republic (Aug. 7, 2004) *available at* http://www.azcentral.com/news/election/ballot/articles/0807protect-arizona07.html. PAN's in-state leaders did nothing to shy away from that sentiment. If anything, they embraced it. Chairman Kathy McKee, for example, publicly stated that it "ma[d]e [her] crazy" that "the election office spends [money] to print voter registration cards and ballots in Spanish." Horizonte Transcript, Interview by José Cárdenas with Ricardo Pimentel, Editorial Columnist for the Arizona Republic, in Phoenix Ariz. (Dec. 18, 2003), *available at* http://www.azpbs.org/horizonte/transcripts/2003/december/dec18_2003.html. In it its early stages, the PAN website suggested that the initiative was intended to prevent the destruction of American culture. *Id.*

That animus was by no means PAN's alone. On the contrary, the climate of the 2004 election was permeated by an anti-Latino sentiment. Joseph Sweeney, the 2004 congressional nominee for a major political party, campaigned for office by handing out fliers that called for the end of "cheap 'wetback' labor"—and the party did not officially respond to the slur. C.J. Karamargin, *County GOP Neutral on Sweeney, His Message*, Arizona Daily Star (Sept. 24, 2004). Local columnists who opposed Proposition 200 received hate mail using terms that "ma[de] clear that the hate is aimed at all people of Mexican descent, including native Arizonans whose roots . . .

go back many generations." Salomon R. Baldenegro, *Hispanic-Hating Sweeney Puts GOP in a Bind*, Tucson Citizen (Oct. 2, 2004) (describing mail referring to Mexican-Americans as "cockroaches" and criticizing "Hispanicks" [sic] for trying to "pass off the USA as a Hispanick [sic] . . . creation").[5]

Perhaps equally telling is that supporters of voter identification requirements, in Arizona and elsewhere, offered little else to justify such a drastic change in the law. In Arizona's official 2004 General Election Publicity Pamphlet, supporters of Proposition 200 claimed that the "initiative . . . strengthens the integrity of [Arizona's] election system by requiring proof of identification to vote." Ariz. Sec'y of State, *Ballot Propositions & Judicial Performance Review for the November 2, 2004, General Election* 46 ("Publicity Pamphlet"); *see* Ariz. Rev. Stat. Ann. § 19-123(A)(3). But the Proposition itself made no findings to that effect.

Likewise, although supporters of the Arizona initiative claimed that "[t]here is evidence of thousands of unverified names on [Arizona's] voter rolls," Publicity Pamphlet at 44, they identified no studies or other facts to support that allegation or other claims of fraud. This is most likely because there was sim-

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[5] A similar bias apparently motivated the chief sponsor of Georgia's voter identification law, who told the United States Department of Justice ("DOJ") that, if African Americans in her district "are not paid to vote, they don't go to the polls," and, if fewer African Americans voted as a result of the statute, it was only because the law would eliminate such fraud. Bob Kemper & Sonji Jacobs, *Voter ID Memo Stirs Tension: Sponsor of Disputed Georgia Legislation Told Feds That Blacks in Her District Only Vote if They Are Paid To Do So*, Atl. J. Const., Nov. 18, 2005, at A1.

ply no evidence to support the claim. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1361-62 and 1366 (N.D. Ga. 2005) (finding no evidence of fraud for in-person voting); *Weinschenk v. State*, 203 S.W.3d 201, 204-05 and 217 (Mo. banc 2006) (same); *Santillanes*, 506 F. Supp. 2d at 637 ("[T]here is no admissible evidence in the record that such voter impersonation fraud has occurred with any frequency in past municipal elections.").

Instead, the majority of statements made in support of Proposition 200 related to claimed negative effects of undocumented immigrants in Arizona. *See* Arizona 2004 Ballot Propositions: Proposition 200 § 2 ("This state further finds that illegal immigrants have been given a safe haven in this state . . . and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship."). Read most favorably, then, the Publicity Pamphlet indicates that supporters of the initiative sought to enact sweeping changes to Arizona's voting and registration requirements in an effort to remedy a non-existent problem.[6]

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[6] Indeed, if the architects of Proposition 200 truly were concerned with preventing fraud, it is strangely suspicious that they left untouched other statutory provisions that are even more vulnerable to supposed voter fraud. For example, Arizona law still allows any elector to submit her ballot at a polling place on Election Day without any identification so long as she (1) requested the ballot before the Saturday preceding the election; (2) provided with the request her date and state or county of birth, or "information that if compared to the voter registration information on file would confirm the identify of the elector," Ariz. Rev. Stat. Ann. § 16-542(A); and (3) attached a specified affidavit to her ballot. *See id.* §§ 16-541, 16-542(A), 16-

Although bad policy does not usually require invalidation of a state law, the absence of any evidence that Proposition 200 was needed to advance a state interest suggests that courts should look carefully at the proffered rationale for such a law. That is especially true given the backdrop of the inflammatory debate that surrounded Proposition 200; the focus of the initiative on immigrants who (in Arizona, at least) are overwhelmingly Latino; Arizona's long history of discrimination against Latino voters, *infra* at 14-17; and the disparate impact the adopted initiative is likely to cause, *see infra* at 17-22. As this Court has explained, when results are "very difficult to explain on nonracial grounds," a serious disparate impact may "for all practical purposes demonstrate unconstitutionality." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

2. Voter Identification Requirements Are The Latest In A Long Line of Discriminatory Measures That Have Been Adopted To Limit The Minority Vote.

Unfortunately, the anti-Latino animus that drove Proposition 200 is consistent with a pattern of dis-

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547(C); Election Manual at 118. Although these early voting procedures impose a somewhat more "cumbersome procedure," *Harman*, 380 U.S. at 542, that many citizens, including non-English speaking Latino citizens, will be unable to navigate, they plainly enable anyone intent enough upon influencing the election as to commit criminal fraud to do so. In short, the continued availability of early voting, which is unlikely to aid the average citizen, suggests that the individuals who spearheaded the initiative were not intent upon eliminating opportunities for fraud but upon burdening the right to vote.

crimination against Latinos and other racial minorities that has characterized Arizona politics since the 1870s, *see* David Berman, *Arizona Politics and Government: The Question for Autonomy, Democracy, and Development* 35 (University of Nebraska Press 1998) ("Arizona Politics"), and is by no means unfamiliar to other states. *See, e.g.*, *Perry*, 126 S. Ct. at 2621-22 (discussing discrimination in Texas); Sam Spital, Book Note, 39 Harv. C.R.-C.L. L. Rev. 287, 287 (2004) (reviewing Laughlin McDonald, (2003)) (discussing the use of poll taxes, "character" exams, and a "literacy" test, selectively enforced, to exclude African Americans from the polls in Georgia).[7]

In 1912, the first Arizona Legislature adopted a law requiring that each voter be literate in English—limiting what was referred to as "'the ignorant Mexican vote.'" Arizona Politics at 14, 67 & n.90 (quoting Letter from M. M. Kelly, editor and publisher of *The Copper Era*, to Reese Ling (Aug. 3, 1912) (on file in the Reese Ling Collection)). "[R]egistrars applied the test to reduce the ability of blacks, Indians, and Hispanics to register to vote" well into the 1960s. *Id.* at 67.

During the mid-to-late 1960s, "[i]ntimidation of Hispanic, Native American, and African American voters at the polls was common in Arizona." Adela de la Torre, *Arizona Redistricting: Issues Surround-*

[7] Arizona's history of discrimination is evidenced by the fact that it is only one of nine jurisdictions where the entire state, as opposed to specific counties, is covered by Section 5 of the Voting Rights Act. U.S. Department of Justice, Civil Rights Division, Voting Rights Section, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Nov. 9, 2007); *see* 42 U.S.C. § 1973c.

ing Hispanic Voter Representation, 6 Tex. Hisp. J.L. & Pol'y 163, 166 (2001). Congress found in 1969 that only two of eight Arizona counties "with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (citing *Hearing on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 409 (1969-1970)).

Since the adoption of the Arizona Constitution, Arizona lawmakers have also attempted in many cases to draw voting districts that limit the impact of the minority vote. *See* Berman, *supra*, at 93 (noting that the framers of the State constitution initially apportioned seats based on each county's total vote, not total population, which resulted in substantial dilution in counties with larger non-voting populations, such as Native Americans and Latinos). That gerrymandering has continued in recent years. Since 1980, the United States Department of Justice ("DOJ") has objected to four of Arizona's redistricting plans on the ground that they would have had a discriminatory impact on minority voters. *See* James Thomas Tucker & Rodolfo Espino, *Voting Rights in Arizona 1982-2006* 4 (March 2006) (describing one plan in the 1980s, two in the 1990s, and one in 2002) ("*Voting Rights in Arizona*"); *see* Letter from John R. Dunne, U.S. Assistant Attorney General, Civil Rights Division, to Lisa T. Hauser, Assistant Attorney General, Phoenix, Arizona (Aug. 12, 1992) (quoted in de la Torre, *supra*, at 166-67) (objecting to the State's proposed redistricting plan on the ground that "[t]he state ha[d] failed . . . [to] show[] that the

plan was not motivated, in part, by a purpose of diluting minority strength in southern Arizona")).

Since 1982, the DOJ has interposed objections to voting changes proposed by seven of Arizona's fifteen counties. *Voting Rights in Arizona* at 4. In 1985, for example, the Attorney General interposed a Section 5 objection to proposed voting changes in Apache County that eliminated polling places on reservation land and denied absentee voting opportunities to Native American voters, recognizing that the voting changes had a "clear discriminatory purpose and effect." *Id.* at 45; *see* 42 U.S.C. § 1973c. As recently as 2002, moreover, the DOJ "identified significant deficiencies in the availability and quality of language assistance offered to American Indian voters in Apache County." *Voting Rights in Arizona* at 17.

3. Voter Identification Statutes Like Proposition 200 Have A Disparate Impact On Low Income And Latino Communities.

Although not dispositive alone, the disparate impact that Proposition 200 has already had on the Latino community is further evidence of the discriminatory animus that motivates voter identification statutes like the initiative. *See Washington*, 426 U.S. at 253 (Stewart, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.").

For example, a recent study found that, among Indiana registered voters, a six-point gap exists in the percentage of White residents, compared to Afri-

can American residents, who have access to valid identification. Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 10 (Wash. Inst. for the Study of Ethnicity and Race, Working Paper), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf. When considering the entire eligible voting population in Indiana, the spread swelled to 11.5%. *Id.* at 10-11. In addition, the study reported that more than 25% of registered voters in Indiana who make less than $40,000 annually lack a driver's license. *Id.* at 17.

National studies generally confirm that minority voters are less likely to have the identification documents required by the voter identification scheme at issue here. According to the Task Force on the Federal Election System To Assure Pride and Confidence in the Electoral Process (also known as the "Carter-Baker Commission"), an estimated 6-10% of the United States' voting population—some eleven to twenty million individuals nationwide—lack photo identification in the form of a driver's license or state-issued, non-driver's identification card. Task Force on the Fed. Election Sys., *To Assure Pride and Confidence in the Electoral Process: Task Force Reports to Accompany the Report of the National Commission on Election Reform* ch. 6 (2001), *available at* http://www.millercenter.virginia.edu/programs/natl_commisions/commisionn final report/task force&uscore:report/task force complete.pdf. Contrary to the court of appeals' suggestion in this case, therefore, millions of Americans manage to "maneuver in today's America without [the type of] photo ID" cards

required by the voter identification laws. *See Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007).

Another study, conducted at the University of Wisconsin-Milwaukee, found that 78% of African American males in Milwaukee County lacked a valid driver's license. *See* John Pawasarat, The Driver License Status of the Voting Age Population in Wisconsin 1 (2005), *available at* http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (Driver License Study). Statewide, 55% of African American men, 49% of African American women, 46% of Latino men, and 59% of Latina women lacked valid licenses, compared to only 20% of Anglo men and 19% of Anglo women. *See id*; *see also Common Cause/Georgia*, 406 F. Supp. 2d at 1342 (finding that 17.7% of African American households in Georgia had no access to a vehicle—a proxy for possession of a license—as compared to 4.4% of Anglo households). According to a 1994 investigation by the DOJ, the discrepancy in Louisiana is even greater: Caucasian residents of that state were four to five times more likely than African American residents to have government-sanctioned photo identification. *See* Letter from David L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Sheri Marcus Morris, Louisiana Assistant Attorney General (Nov. 21, 1994).

The available evidence also shows that, in jurisdictions in which voters may sign an affidavit in lieu of presenting identification, minority citizens are far more likely to require use of an affidavit than other voters. In South Dakota, for example, voters in predominantly Native American counties were two to

eight times more likely to use an affidavit than voters statewide. *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 662 & n.154 (2007) (affidavits were used by 2% of voters statewide and by 4%-16% of voters in predominantly Native American counties); *see also* Letter from Neil Bradley, Associate Director, American Civil Liberties Union, to John Tanner, Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (April 14, 2006) (Florida study showed that African American voters in Hillsborough County were three times as likely as White non-Hispanic voters to use affidavits, in lieu of identification, to prove their identities at the precinct level and Hispanic voters were twice as likely to use affidavits).

Not only does the data demonstrate that voter identification laws disproportionately impact minority voters, it also suggests reasons why that disproportionate impact occurs. First, and most obviously, the costs associated with securing the documents required to obtain an acceptable form of identification have a disproportionate impact based on race. For example, on average, Latino Arizonans have a lower income and are more likely to live in poverty than Arizona residents generally. *See* U.S. Census 2006 Survey, table S0201, *available at* http://factfinder.census.gov/home/saff/main.html?_lang=en (Select "Arizona" from the "State" menu) (22.5% of Latino Arizonans, compared to 14.2% of the total State population, live in poverty, and per capita income for Latino Arizonans was $13,528 compared to $26,715 for the White non-Hispanic population). In fact, 8.9% of Latino Arizonans and an additional 18.1% of Native Americans in the

State live at less than 50% of the poverty line—meaning that, in 2006, approximately 157,000 Latino and 48,600 Native American Arizonans, respectively, had an income of less than $5,200. *Id.*, table S1703, *available at* http://factfinder.census.gov/servlet/STGeoSearchByListServlet?_lang=en&_ts=212894706125 (Select "Arizona" from the "State" menu); U.S. Census Bureau, Poverty Thresholds 2006, http://www.census.gov/hhes/www/poverty/threshld/thresh06.html. For these individuals, the cost of obtaining a replacement naturalization certificate (one of several forms of documentation that may be necessary to obtain a driver's license) is a significant portion of their annual income.

Second, Latinos are also less likely to have access to telephone service and, therefore, a telephone bill that might be used as secondary identification. U.S. Census 2006 Survey, table S0201 (10.6% of Latino Arizonans compared to 6.4% of the total population live in households with no telephone service). Latino Arizonans are similarly more likely to live in intergenerational or interfamilial households and therefore are less likely to have access to other utility bills in their own names. *Id.* (7.3% of Latino grandparents, compared to 3.8% of all grandparents, live with their grandchildren, and 12.0% of Latinos, as compared to 7.8% of the total population, live with relatives other than their immediate family members).

Third, one national study has concluded that voter identification requirements disproportionately discourage from voting those individuals who lack a high school diploma—a group of voters in Arizona that disproportionately includes Latinos and other

minority voters. Timothy Vercellotti & David Andersen, *Protecting the Franchise, or Restricting it? The Effects of Voter Identification Requirements On Turnout* 11 (2006) (voters who lacked a high school diploma were 5.1% less likely to vote; the total population was 2.9% less likely to vote); *see* U.S. Census 2006 Survey, table S0201 (39.4% of Latino Arizonans, compared to 16.2% of the total population, 25 years and older, lack high school diplomas). Latinos were ten percent less likely to vote in states that required some form of non-photo identification than they were in states where voters were required only to give their names. Vercellotti at 12.[8]

For these reasons, statutes like Proposition 200 and the Indiana scheme place a real burden on millions of voting-age citizens, a burden which will be disproportionately shouldered by minority voters.[9]

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[8] Thus, there is no reason to believe that Arizona's acceptance of secondary documents diminishes the burden imposed by Proposition 200 in any noteworthy way. Aside from the obvious fact that a single name may appear on an electric bill, while multiple members of a household may be eligible to vote, Proposition 200 effectively disenfranchises electors who do not maintain a bank account or possess an Arizona vehicle registration or vehicle insurance card—the same people one might generally expect to lack a driver's license in the first place. *See* Election Manual at 113-14.

[9] In this fashion, voter identification provisions expand an already-troubling divide in the franchise between Anglos and minorities. *See* Brennan Center for Justice, on Behalf of The National Network on State Election Reform, *Response to the Report of the 2005 Commission on Federal Election Reform* 6 (2005), *available at* www.brennancenter.org/dynamic/subpages/download_file_47903.pdf (noting that minority voters are more likely than white voters to be asked to furnish identification at the polls, even when a state has no identification requirement); U.S. Comm'n on Civil Rights, *Voting Irregulari-*

II. Laws Like The Indiana Statutes And Proposition 200 Function As Poll Taxes And Should Be Subject To Strict Scrutiny.

As explained above, Proposition 200 emerged from a racially-charged debate over immigration and has already had a significant adverse impact on voting in Arizona. This Court has never sustained such a pernicious and targeted burden on the right to vote. It has held in no uncertain terms that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper*, 383 U.S. at 666. The Court has insisted that the constitutional prohibition on poll taxes prohibits any "onerous procedural requirement[] [that] effectively handicap[s] exercise of the franchise." *Harman*, 380 U.S. at 541 (internal citation omitted).

Laws like Proposition 200 and the Indiana statute at issue in this case impose just that kind of requirement. The Twenty-fourth Amendment prohibits any state from either denying or abridging an individual's right to vote "by reason of [his] failure to pay any . . . tax." U.S. Const., amend. XXIV. In *Harman*, this Court read the Amendment to prohibit

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ties in Florida During the 2000 Presidential Election (2001), *available at* http://www.uscer.gov/pubs/vote2000/report/main.htm (noting that, in Florida in 2000, "black voters were nearly 10 times more likely than nonblack voters to have their ballots rejected" and disproportionately more likely to be incorrectly "purged" from the election lists, and "[a] large number of limited-English-speaking voters" were "denied assistance at polling places, despite federal requirements that they be aided").

a state from conditioning the vote on either payment of a fee or the filing of a "witnessed or notarized certificate" that would prove residence. *Harman*, 380 U.S. at 529. The same type of "cumbersome procedure" is in place here. *Id.* Indiana voters must, in order to avoid purchasing the requisite identification, either return to execute an affidavit before election officials at a later date, or navigate the absentee voting process (which is what is required in Arizona). Either option "amounts to the [regular] re-registration" that the Court rejected in *Harman*, 380 at 542. What is more, while the poll tax challenged in *Harman* at least had the virtue of being a "simple" system, *id.*, Indiana and states like it have imposed "onerous procedural requirements" on both the tax and the alternative. *Id.* at 541.

Even if the Indiana voter identification law, like Proposition 200, were not indistinguishable in all material respects from a poll tax, it should nevertheless be subject to strict scrutiny. This Court has recognized that the right to vote is fundamental because it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The right to vote is also the basis for the Court's oft-applied presumption that enacted statutes are constitutional because they embody the will of a government "structured so as to represent fairly all the people," not just a fortunate few. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969).[10] Because the Indiana law and Proposition

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[10] Thus, laws that exclude a particular group from participating in the franchise demand strict scrutiny, even if other laws that affect administration of the ballot do not. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 361

200 directly and substantially impinge on those rights, they should be subject to strict scrutiny.

Moreover, voter identification schemes may also be intended to, and may have the effect of, discriminating against minority voters. As the record of Proposition 200 demonstrates, "[p]rocedural" demands all too often mask discriminatory designs based on race, class, or politics. *See Harman*, 380 U.S. at 540 (noting that "the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of [African Americans] and applied in a discriminatory manner"). This Court has traditionally viewed with skepticism any statute that suggests a "troubling blend of politics and race." *Perry*, 126 S. Ct. at 2623 (addressing partisan redistricting); *see Guinn v. United States*, 238 U.S. 347, 365 (1915) (striking down facially-neutral "grandfather clause" because the law "in substance and effect" discriminated against African American voters); *see also Perry*, 126 S. Ct. at 2621 (recognizing the poll tax as a discriminatory device used in Texas against

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(1997) (finding it significant, in determining that challenged law did not impose a severe burden, that the state had not "excluded a particular group of citizens, or a political party, from participation in the election process" or "directly preclude[d] minor political parties from developing and organizing"); *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972) (ruling, only after determining that the challenged law "d[id] not place a condition on the exercise of the right to vote," that the ballot-access barrier challenged "d[id] not of itself compel [strict] scrutiny"); *accord Dunn*, 405 U.S. at 337 ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others," the "exclusions [must be] necessary to promote a compelling state interest.").

African Americans and Latinos). Strict scrutiny is indispensable where, as in Arizona, the challenged law follows previous attempts to limit the franchise of a particular group of voters. *See Rosen v. Brown*, 970 F.2d 169, 177 (6th Cir. 1992) (applying standard set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and explaining that, "in light of the history of Ohio election laws [ruled unconstitutional], the State's claim of compelling interest should be viewed with skepticism").

The court of appeals in this case erred in suggesting that the framework set out by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), required anything less in this case. *See Dunn*, 405 U.S. at 336. Contrary to the court of appeals' suggestion, *see Crawford*, 472 F.3d at 925, "[it] makes no difference" to the analysis that the burden imposed by the voter identification statutes falls upon a limited portion of the electorate, *Burdick*, 504 U.S. at 447 (Kennedy, J., dissenting). The right to vote is "individual and personal in nature." *Reynolds*, 377 U.S. at 561; *see Burdick*, 504 U.S. at 447 (Kennedy, J., dissenting) (explaining that "[f]or those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total" and thus the analysis of the statute did not turn on "the likelihood that [a particular] candidate w[ould] be successful"). In short, the court of appeals' cavalier disregard of the individual's right to vote and its own role in reviewing discriminatory legislative enactments was erroneous, whatever the standard of review articulated in *Burdick*. *Amicus* therefore respectfully requests that this Court reverse the deci-

sion below and hold unconstitutional the onerous requirements Indiana has imposed on the fundamental, individual right to vote.

III. If This Court Upholds The Indiana Scheme, The Differences Among Voter Identification Laws Counsel A Narrow Ruling.

Amicus agrees with petitioners that the Indiana photo-identification scheme places an unconstitutional burden on the right to vote, requiring eligible voters to jump through bureaucratic hoops or spend significant sums of money in order to acquire a driver's license or a "free" voter identification card. Ind. Code. § 9-24-16-10(b); 140 Ind. Admin. Code 7-4-3-(b) through (e). Should this Court conclude on the record before it that the Indiana statutes are constitutional, however, MALDEF respectfully urges the Court to do so on narrow grounds that expressly leave room for lower courts to invalidate other, more burdensome and discriminatory schemes.

A. Arizona's Voter Identification Requirement Lacks Necessary Exceptions That Would Lighten Its Burden On The Franchise.

Although Arizona's Proposition 200 and the Indiana law challenged here are similar, they also differ in important ways. As described above, the Arizona statute, unlike the Indiana scheme, does not exempt residents of nursing homes or indigent electors and offers a dramatically shorter period for voters to return with required documentation in order to have their ballots counted. *See supra* Section I.A. These statutory differences, as well as the differences arising from the overtly discriminatory origins and dis-

parate impact of the Arizona scheme, may be constitutionally significant. Thus, even if the Court concludes that the Indiana statute passes constitutional muster, it should leave room in its decision for lower courts to consider and, where appropriate, to reject schemes like Arizona's Proposition 200.

B. Proof-of-Citizenship Requirements Impose a Burden That Cannot Be Sustained On the Same Basis As A Voter Identification Requirement.

Finally, regardless of the particular outcome in this case, the Court should reserve judgment on the validity of documentary proof-of-citizenship requirements, like those imposed by Proposition 200, *see* Ariz. Rev. Stat. Ann. § 16-166(F), until it is confronted by a case that presents that separate, albeit related, burden. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring) (explaining that, given "the importance of the constitutional issues" raised by Proposition 200, the Court was wise to allow the election to proceed under the new statute and thereby "enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation"). Application of the initiative's proof-of-citizenship requirement alone imposes a substantial burden on Arizona residents that has required counties to reject tens of thousands of applications for registration.

The initiative also provides for methods of proving citizenship that have required some naturalized immigrants to make several attempts to register and to register in person, because county officials have rejected applications including a "naturalization number" and required the certificate itself. *See* Ariz.

Rev. Stat. § 16-166(F)(4) (requiring "presentation" of immigration document to county official); Arizona Voter Registration Form, *available at* http://www.azsos.gov/election/forms/VoterRegistrationForm.pdf. This, too, suggests a "troubling blend of politics and race" of which the Court should be suspicious. *Perry*, 126 S. Ct. at 2623. In short, even apart from the voter identification requirements imposed by the initiative, the injury caused by Proposition 200's registration requirements unquestionably requires the "exacting judicial scrutiny applied [to] statutes distributing the franchise," *Kramer*, 395 U.S. at 628, and cannot withstand such review.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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32pgs Nos. 07-21, 07-25

In The
Supreme Court of the United States

CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Respondents. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the Nation.

MSLF has been involved in litigation aimed at protecting the right to vote free from vote dilution.

[1] Each party has filed with the Court blanket consent to the filing of *amicus curiae* briefs. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Most recently, MSLF represented a non-profit group that attempted to intervene in *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), a case in which a regulation that required proof of citizenship to register to vote was challenged on constitutional grounds. An issue in that case was decided by this Court. *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5 (2006) (*per curiam*).

STATEMENT OF THE CASE

Effective July 1, 2005, Indianans who vote in-person are required statutorily to present government-issued photo identification. Ind. Code § 3-11-8-25.1(b). In the absence of the requisite identification, poll workers are instructed to "challenge the voter." Ind. Code § 3-11-8-25.1(c)(2). The voter is then permitted to cast a provisional ballot. Ind. Code § 3-11-8-25.1(d). This provisional ballot may be validated within ten days following the election by providing the requisite identification and signing an affidavit. Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

Photo identification is not required, however, for those who vote by absentee ballot, Ind. Code § 3-11-10-1.2; those who vote in a state licensed care facility where the voter resides, Ind. Code § 3-11-8-25.1(e); the indigent, Ind. Code § 3-11.7-5-2.5(c)(2)(A); and individuals with religious objections, Ind. Code § 3-11.7-5-2.5(c)(2)(B). Further, those individuals who lack the requisite identification may obtain one free

of charge, Ind. Code § 9-24-16-10(a), so long as the individual presents a document containing the person's name and current address and at least one "primary document," such as a birth certificate, passport, military or veteran identification card, or Indiana driver's education permit. *See* 140 Ind. Admin. Code § 7-4-3.[2]

It is the acquisition of these documents, which, in some cases, may cost money, that Petitioners contend infringes on their fundamental right to vote. Ind. Dem. Br. 31-41; Crawford Br. 39-45. Specifically, Petitioners claim that those people who do not vote absentee, are not in a licensed care facility, have no religious objections, are not indigent, and who lack both a government-issued photo ID and any of the documents necessary for obtaining a free government-issued photo ID, may be deprived of their fundamental right to vote. *Id.*

Thus, on June 13, 2005, two challenges to the constitutionality of the Indiana law – one filed by the Crawford plaintiffs, and one filed by the Indiana Democratic Party plaintiffs, both premised on the alleged denial of the fundamental right to vote – were consolidated in one district court case. *Crawford v. Marion County Election Bd.*, No. 1:05-cv-00804-SEB-VSS, Docket Nos. 1, 12 (S.D. Ind. June 13, 2005). After cross-motions for summary judgment were filed,

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[2] Hereinafter, these statutory provisions will be known, collectively, as "the Indiana law."

the district court upheld the constitutionality of the Indiana law. *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775 (S.D. Ind. 2006). On appeal, this decision was upheld by the Seventh Circuit. *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *rehearing en banc denied*, 484 F.3d 436 (7th Cir. Jan 4, 2007).

The Indiana Democratic Party plaintiffs petitioned this Court for *certiorari* on July 2, 2007, and the Crawford plaintiffs filed a petition for *certiorari* on August 6, 2007. On September 25, 2007, this Court granted the petitions and consolidated the two cases. *Crawford v. Marion County Election Board*, ___ U.S. ___, 128 S.Ct. 33 (Sept. 25, 2007); *Indiana Democratic Party v. Rokita*, ___ U.S. ___, 128 S.Ct. 34 (Sept. 25, 2007).

SUMMARY OF THE ARGUMENT

Though Petitioners come in all shapes and sizes, none of them satisfies the standing requirements, as set forth meticulously by this Court. The Indiana Democratic Party, the Marion County Democratic Central Committee, the United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP all lack both direct standing, and standing to sue on behalf of their members. Likewise, State Representative William

Crawford and Township Trustee Joseph Simpson lack standing to sue both on behalf of themselves, and on behalf of their electorate. Specifically, the alleged injury proffered by each of the Petitioners is, at best, conjectural and hypothetical; moreover, it is purely speculative to believe that a favorable decision could redress any of the Petitioners' alleged injuries.

Nonetheless, even if standing were found for any of the Petitioners, the Indiana law would withstand constitutional scrutiny because the purported burden on the Petitioners is more than offset by Indiana's compelling interest in preserving the public's confidence in the electoral process. As a result, this Court should uphold the constitutionality of the Indiana law.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE ALLEGED DENIAL OF THE FUNDAMENTAL RIGHT TO VOTE.

Because the right to vote is "individual and personal in nature[,]" *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (citing *U.S. v. Bathgate*, 246 U.S. 220, 227 (1918)), any law that infringes upon even one person's fundamental right to vote is unconstitutional in its application. However, to challenge such a law, a person or entity has the burden of proving that he or it satisfies the Article III standing requirement. U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element of standing

'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. . . ."). Petitioners include two political organizations: the Indiana Democratic Party and the Marion County Democratic Central Committee (together, "the Democrats"); two individuals: State Representative William Crawford and Township Trustee Joseph Simpson; and several non-profit political interest groups: the United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indiana Coalition on Housing and Homeless Issues, and the Indianapolis Branch of the NAACP (together, the "Organizational Petitioners"). None of these Petitioners satisfies the Article III standing requirement.

In *Lujan v. Defenders of Wildlife*, this Court made clear that one of the most important elements of standing is the certainty of injury. *Lujan*, 504 U.S. at 560-61. For a plaintiff to have standing to raise a claim, he must demonstrate an injury that is "concrete and particularized" rather than "conjectural or hypothetical. . . ." *Id.* at 560 (internal citations and punctuation omitted). Additionally, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal citations and punctuation omitted).[3]

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[3] In addition to these requirements, there also must be a "causal connection between the injury and the conduct complained of. . . ." *Lujan*, 504 U.S. at 560.

Moreover, this Court has recognized that an association has standing to bring a suit on behalf of its members only so long as, *inter alia*, the association's members would "otherwise have standing to sue in their own right."[4] *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977). Thus, the issue before the Court is whether any of the Petitioners or any of Petitioners' members satisfies the *Lujan* test for standing.

A. Each Of The Petitioners Fails To Demonstrate A Concrete And Particularized Injury In Fact.

1. The alleged injury to the "members" of the Democrats is, at best, conjectural and hypothetical.

Although the Seventh Circuit noted that "the Indiana law will deter some people from voting," *Crawford*, 472 F.3d 949, the notion that even one individual will be denied the fundamental right to vote is conjectural and hypothetical. The Seventh Circuit identified two potential injuries that could result from the Indiana law. First, individuals who do not already possess a photo ID may be denied the right to vote. *Crawford*, 472 F.3d at 951. Second,

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[4] The other two requirements for associational standing include: 1) that the interest being protected is germane to the organization's purpose, and 2) that the participation of individual members is not required. *Hunt*, 432 U.S. at 343. However, these two requirements are not relevant in this inquiry.

individuals who do own a photo ID, but who "forget to bring it to the polling place may say what the hell and not vote, rather than go home and get the ID and return to the polling place." *Id.* Then, based on these conjectural and hypothetical injuries, the Seventh Circuit concluded that the Democratic Party has "standing to assert the rights of those of its members who will be prevented from voting by the new law." *Crawford*, 472 F.3d at 951. However, a more careful analysis of each scenario reveals the flaws in the Seventh Circuit's logic.

Under the first scenario, the Indiana law requires the presentation of a government-issued photo ID to vote in-person. Ind. Code § 3-11-8-25.1(b). Thus, Indianans who lack such an ID must obtain one prior to voting in-person, and can do so at no cost. Ind. Code § 9-24-16-10. However, before such an ID is issued, certain other documentation, such as a birth certificate, U.S. passport, or a Medicaid/Medicare card, is required. 140 Ind. Admin. Code § 7-4-3. For those who lack such documentation, a monetary fee and an inconvenience cost may be required to obtain them. Ind. Dem. Pet. 8-10. Exceptions are made for the elderly living in a nursing home, Ind. Code § 3-11-8-25.1(e); voters who vote by absentee ballot, Ind. Code § 3-11-10-1.2; the indigent, Ind. Code § 3-11.7-5-2.5(c)(2)(A); and individuals with religious objections, Ind. Code § 3-11.7-5-2.5(c)(2)(B).

Thus, a hypothetical person who lacks both a government-issued photo ID and any of the documents required to obtain a free government-issued

photo ID, and who is neither elderly nor indigent, and who does not have a religious objection, and who does not qualify for an absentee ballot, could, arguably, be denied the ability to vote. Assuming, *arguendo*, that this inability to vote would rise to the level of an unconstitutional infringement upon the fundamental right to vote,[5] the Petitioners "have not presented any substantiation that any such voters actually exist." *Rokita*, 458 F.Supp.2d at 811. None of the Petitioners were able "to provide the names or otherwise identify any particular affected individuals . . . despite various polls and surveys that were conducted for the specific purpose of discovering such individuals." *Id.* at 823. Instead, the Petitioners failed to produce any "evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote" or "any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote." *Id.* at 822. As a result, the notion that some "member" of the Democratic Party of Indiana or the Marion County Democratic Central Committee

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[5] As Respondents eloquently explain in their Brief In Opposition To The Petitions, the Indiana law is merely a non-discriminatory regulation of election procedures designed to protect against voter fraud, rather than a substantive and discriminatory barrier to voting. Response To Pet. 18-21.

actually was disenfranchised by this law is purely conjectural and hypothetical.[6]

Under the second scenario identified by the Seventh Circuit – the instance of a voter who owns a photo ID, neglects to bring it to the polls, and then chooses not to vote – the district court granted standing to the Democratic Party of Indiana and the Marion County Democratic Central Committee because of the "*potential exclusion* of votes by individuals intending to vote for Democratic candidates." *Rokita*, 458 F.Supp.2d at 812 (emphasis added). The district court did not even attempt to construe this "injury" as anything but conjectural and hypothetical. Instead, the district court misapplied the rule of law from *Campbell v. Louisiana*, 523 U.S. 392 (1998).

In *Campbell*, this Court concluded that a criminal defendant had standing to challenge racial discrimination as to potential jurors because such discrimination could "cast[] doubt on the integrity of the judicial process. . . ." *Id.* at 397. Likewise, the district court below analogized that the standing requirement was satisfied. It reasoned that certain people may show up at the polls intending to vote, discover they inadvertently forgot their photo ID, vote

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[6] Moreover, as the district court rightly concluded, the Democrats lack standing to sue on behalf of individuals desiring to vote for democratic candidates, since such individuals are not "members" of either the Indiana Democratic Party or the Marion County Democratic Central Committee. *Rokita*, 458 F.Supp.2d at 811.

a provisional ballot, and then lazily choose not to validate their ballot, or forget to do so. Because Indiana law prohibits the state from counting these unvalidated provisional ballots, the district court speculated that doubt would be cast on the integrity of the election. *Rokita*, 458 F.Supp.2d at 812.

But precisely the opposite is true. It is speculative and hypothetical to infer that people will question the integrity of an election because certain people neglected to abide by relatively mundane procedural requirements. It is far more realistic to infer that, in the absence of the voter ID law, people will question the integrity of an election in which voter registration was "significantly inflated," *Rokita*, 458 F.Supp.2d at 826, given that voter fraud is particularly difficult to apprehend. *Id.* Indeed, inherent in the fundamental right to vote is the obligation of the legislature to prevent electoral fraud. *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Thus, no standing is conferred upon the Democrats.

More fundamentally, though, a person who fits into this second category fails to identify *any* injury in fact. Under this scenario, a person first fails to obey a simple, procedural voting rule requiring him to present a photo ID at the polls.[7] Then, rather than

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[7] The Constitution compels states to regulate the "times, places and manner of holding elections for Senators and Representatives. . . ." U.S. Const. art. I, § 4. Pursuant to the Tenth Amendment, this power has been interpreted broadly as granting states the power to regulate elections. *Sugarman v. Dougall*,

(Continued on following page)

voting a provisional ballot and returning with a proof of ID, the voter decides not to vote at all, or decides not to bother to return to validate his provisional ballot. This is not a denial of the fundamental right to vote. Instead, this is a voluntary choice by the would-be voter not to exercise the right to vote.

Thus, under both the first and second scenarios, the Democrats' members' alleged injury is, at best, speculative and hypothetical, and under the second scenario, the members' purported injury is not an injury at all. In any case, the Democrats do not satisfy the standing requirement.

2. The Democrats lack a direct injury in fact.

The Seventh Circuit, citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982), held that the Democrats suffered a direct injury, which would confer standing upon them. *Crawford*, 472 F.3d at 951. Specifically, the Seventh Circuit reasoned that the Indiana law would compel the Democratic Party to "devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." *Id.*

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413 U.S. 634, 647 (1973) (quoting *Oregon v. Mitchell*, 400 U.S. 112 124-25 (1970) (footnote omitted) (opinion of Blackmun, J.) (ex laining the history and intent of these constitutional provisions)). As a result, this Court generally upholds non-discriminatory laws that merely regulate the voting process. *See* Respondents' Br. in Opp. 14-21.

Havens, however, is inapposite. There, this Court granted standing to a non-profit organization, whose purpose was to provide housing opportunities for minorities and that expended its resources to uncover illegal discrimination. *Havens*, 455 U.S. 368. As the district court rightly explained, however, there is no cognizable injury in fact when a reallocation of resources is the "sole and voluntary decision" of the allegedly injured party. *Rokita*, 458 F.Supp.2d at 816 (citing *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) ("The diversion of resources . . . might well harm [a plaintiff's] other programs, for money spent on [one thing] is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from [a plaintiff's] own budgetary choices."); *see also Common Cause/Georgia v. Billups*, 504 F.Supp.2d 1333, 1373 (N.D. Ga. 2007). As a result, should the Democrats choose to spend their money facilitating compliance with the Indiana law, they would do so out of their own volition, which would negate any notion that they suffer a cognizable injury in fact.

Furthermore, as the district court explained: "If an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a lawsuit. Such an interpretation flies in the face of well-established standing principles."

Rokita, 458 F.Supp.2d at 817; *see also Billups*, 504 F.Supp.2d at 1373.

3. The alleged injury to the members of the Organizational Petitioners is conjectural and hypothetical.

The district court observed:

> [W]hat the Organization Plaintiffs have presented to the Court . . . is nothing more than unsupported assertions. None of the Organization Plaintiffs has identified a single member who does not already possess the required photo identification and has an injury beyond "mere offense" at having to present photo identification in order to vote. . . ."

Rokita, 458 F.Supp.2d at 817. Because the alleged injury to the members of the Organizational Petitioners is speculative and hypothetical, they lack standing to seek redress on behalf of their members.

4. The Organizational Petitioners' purported direct injury is speculative and hypothetical.

The Organizational Petitioners also lack direct standing to challenge the Indiana law. Not only are the Organizational Petitioners' purported injuries self-inflicted and alleged in a manner that would, in effect, eviscerate Article III standing, *see* Section I(A)(2), *supra*, but also there exists yet another

reason to deny direct standing to the Organizational Petitioners. In *Havens*, this Court "did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs." *Fair Employment Council*, 28 F.3d at 1277. Thus, standing was premised on the fact that the plaintiffs had "already expended resources in order to investigate and uncover" the defendant's illegal conduct. On the contrary, the Organizational Petitioners here merely speculate that they might "under undefined circumstances in the future, be required to divert unspecified resources to various outreach efforts" to inform the public of the photo ID requirement. *Rokita*, 458 F.Supp.2d 775, 816 (citing *Havens*, 455 U.S. 363); *see also Billups*, 504 F.Supp.2d at 1372. Because of the uncertainty of such a potential diversion of funds, the Organizational Petitioners' purported injury is purely speculative and hypothetical.

5. The alleged injury to Representative Crawford and Mr. Simpson is speculative and hypothetical.

The standing of Representative Crawford and Mr. Simpson has been analyzed in three different ways. First, these elected officials contend that they "risk receiving fewer votes" as a result of the Indiana law, *Rokita*, 458 F.Supp.2d at 814; however, both were denied standing by the district court, which correctly found that their "speculations" about receiving fewer

votes had not "been supported by any evidence or concrete facts." *Id.* Thus, Representative Crawford and Mr. Simpson do not come close to satisfying their burden of identifying a "concrete and particularized" injury.

Additionally, both Representative Crawford and Mr. Simpson contend they have standing to "raise the injuries encountered by voters in their respective districts," *Id.*; however, the district court rightly denied standing for each of the individuals based on his inability to "identif[y] any such voters in either constituency group who stand to be harmed" by the Indiana law. *Id.*

Nonetheless, based on a third theory, the district court did hold that Representative Crawford and Mr. Simpson satisfied the standing requirement. *Id.* at 815. The district court somehow concluded that Representative Crawford and Mr. Simpson had standing to assert the rights of those individuals who possess the proper identification, but who, potentially, might inadvertently not bring the requisite ID to the polls, thereby compelling such individuals to vote a provisional ballot, thereby casting doubt on the integrity of the entire election. *Id.* But as explained in Section I(A)(1), *supra*, this far-fetched scenario would cast very little doubt on the integrity of the election. Yet the absence of the Indiana law, and the resultant threat of voter fraud, would inevitably impugn the election. Ultimately, any injury to either Representative Crawford or Mr. Simpson is purely speculative

and hypothetical, thus the officials fail to satisfy the standing requirement.

B. The Ability Of A Favorable Decision To Redress The Alleged Injury Is Speculative.

Assuming, *arguendo*, that a concrete and particularized injury exists, the Democrats and the Organizational Petitioners lack standing to bring suit on behalf of their members because there is no evidence that the invalidation of the Indiana law will redress their members' purported injuries. Likewise, Representative Crawford and Mr. Simpson also fail to satisfy the standing requirement, as there is no evidence that a favorable decision will redress their injuries.

In *Los Angeles v. Lyons*, the plaintiff was the subject of allegedly unconstitutional police action. 461 U.S. 95 (1983). Nonetheless, this Court denied the plaintiff standing to sue for injunctive relief from those actions holding that "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, [the plaintiff] is no more entitled to an injunction that any other citizen of Los Angeles. . . ." *Id.* at 111.

Similarly, assuming that Representative Crawford, Mr. Simpson, and the members of the Democrats or the Political Organizations have experienced a concrete and particularized injury, there is not a "sufficient likelihood" that such an injury will occur

again if the Indiana law is not invalidated. If any one of the aforementioned Petitioners were unable to have his vote counted as a result of the person's lack of a photo ID, there is no evidence whatsoever that that person will not acquire the requisite photo ID in anticipation of a future election. Furthermore, assuming that some of the aforementioned Petitioners own the requisite photo ID but inadvertently failed to bring it to the polls, voted a provisional ballot, and then neglected to return to validate the provisional ballot, there is not "sufficient likelihood" that, in a future election, the photo ID will, again, be forgotten, lost, or stolen, or that the Petitioner will choose not to return to validate the provisional ballot.

Given this lack of evidence, there is not a "sufficient likelihood" that the affected Petitioners would be denied the right to vote in the future as a result of the Indiana law. Therefore, any redress to the Petitioners that may result from an injunction invalidating the law on constitutional grounds is purely speculative.

Furthermore, even in the absence of the Indiana law, there is no evidence that the aforementioned Petitioners would not be denied the ability to vote on other grounds. In *Warth v. Seldin*, the plaintiffs challenged zoning practices that allegedly made it too expensive for them to move to the city of Penfield, New York. 422 U.S. 490 (1975). This Court denied the plaintiffs standing because they could not show that, in the absence of the zoning practices, the plaintiffs

would be able to afford to move to Penfield. *Id.* at 505-506.

Likewise, in the absence of the Indiana law, there is insufficient evidence to prove that the aforementioned Petitioners would be permitted to vote. Perhaps Petitioners will arrive at the polls after the polls had closed. Perhaps Petitioners will vote improperly, thereby invalidating their ballot. Indeed, there may be "a number of factors that are unrelated to defendants' alleged abuses" that could prevent Petitioners from voting. *Winpisinger v. Watson*, 628 F.2d 133, 137 (D.C. Cir. 1980) (holding that the plaintiffs lacked standing because there were a number of factors, other than defendants' alleged conduct, that could affect how people vote). In any case, it is speculative to assume that Petitioners are "sufficient[ly] likel[y]" to be permitted to vote in the absence of the Indiana law.

II. PETITIONERS FAIL TO SATISFY EITHER PRONG OF THE *ANDERSON* BALANCING TEST.

Petitioners argue that the Indiana law fails to satisfy the balancing test described in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Ind. Dem. Br. 25-41; Crawford Br. 35-61. In that case, this Court held that, in evaluating constitutional challenges to state election laws, the "character and magnitude of the asserted injury" must be weighed against the "legitimacy and strength" of the state's justifications,

and the necessity "burden[ing] the plaintiff's rights." *Anderson*, 460 U.S. at 789. Assuming, *arguendo*, that Petitioners satisfy the standing requirement, their allegations regarding the constitutionality of the Indiana law collapse under their own weight.

A. The Character And Magnitude Of Petitioners' Injury, If Any, Are Not Severe.

Petitioners have characterized their injury as a deprivation of the fundamental right to vote. Ind. Dem. Br. 31-41; Crawford Br. 35-45; however, the existence of a constitutionally cognizable injury to Petitioners is dubious at best.

This Court has made clear that the fundamental right to vote does not include "the right to vote in any manner" or "the right to associate for political purposes through the ballot. . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The Indiana law permits those lacking a photo identification to vote in a nursing home (if the voter is a resident of the home), via absentee ballot (if the voter qualifies), or with a provisional ballot at the polls, which can be validated within ten days of the election. Thus, although the proscribed manners for voting may not be a voter's preferred method, the voter's fundamental right to vote is not inhibited by being denied the right to vote in-person on a non-provisional ballot on election day. Instead, the photo identification requirement is a reasonable method for the state to exercise its constitutional obligation to regulate elections.

Even assuming, however, that the fundamental right to vote is implicated, the burden on that right is not severe because the Indiana law affects the voting process, rather than increasing substantive qualifications for voting. This Court has definitively stated that "[m]any electoral regulations . . . require that voters take some action to participate in the [electoral] process." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). "To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result. . . ." *Id.*

Indisputably, it is "exceedingly difficult to maneuver in today's America without a photo ID. . . ." *Crawford*, 472 F.3d 949, 951. Nonetheless, the numerous exceptions in the Indiana law ensure that those without a photo ID can vote, provided they observe the mundane procedural requirements within the exceptions. Thus, the character and magnitude of Petitioners' injury, if any, are not "severe."

B. Even Absent Proof Of Actual Voter Fraud, The Legitimacy And Strength Of The State's Interest In Preserving The Public's Confidence In The Electoral Process Suffices To Uphold The Constitutionality Of The Law.

Petitioners have questioned the legitimacy and strength of Indiana's justifications for the photo

identification requirement because the desire to prevent future electoral fraud is "unsupported by evidence of past fraud." Ind. Dem. Pet. 19; *see also Purcell*, ___ U.S. ___, 127 S.Ct. at 8 (Stevens, J. concurring) (concluding that a factual conclusion regarding "the prevalence and character of the fraudulent practices" was necessary to determine the constitutionality of election regulations). However, such evidence is not required here.

Applying the *Anderson* framework, this Court held in *Burdick* that, when voting rights are not subject to "severe" restrictions, strict scrutiny should not apply. *Burdick*, 504 U.S. at 434. Instead, "reasonable, nondiscriminatory restrictions," which further a state's interests in preserving the electoral process, should be upheld. *Id.* Here, Petitioners' injury, if any, is far from severe, *see* Section II(A), *supra*, so the procedural voting regulations in the Indiana law should be upheld.

Moreover, the Indiana law satisfies the standard enunciated in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In that case, a minor political party argued its members' fundamental rights were impinged by a state law aimed at reducing confusion in the voting process resulting from ballot overcrowding by minor party candidates. *Id.* This Court held, in no uncertain terms that:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the

> imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the *electoral process* with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96 (emphasis added).

Thus, in spite of Petitioners' arguments to the contrary, no evidence of voter fraud is necessary to uphold the constitutionality of the Indiana election-procedure law, so long as the law is reasonable and does not significantly impinge on constitutionally protected rights.

1. The Indiana law "does not significantly impinge on constitutionally protected rights."

The Indiana law does not result in any constitutionally cognizable injury, and even if the law did impinge upon Petitioners' constitutionally-protected voting rights, its impact would not be severe. *See* Section II(A), *supra*. Thus, the law "does not

significantly impinge" on Petitioners' constitutionally protected voting rights.

2. The Indiana law is reasonable.

Furthermore, the Indiana law is reasonable. This Court has recently held that "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S.Ct. at 7. As a result, states have a compelling interest in preserving the integrity of the electoral process. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). To this end, without unconstitutionally increasing the substantive qualifications for voting, "government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of . . . elections . . . to reduce election and campaign-related disorder.").

The Indiana law is an utterly reasonable attempt by the State of Indiana to protect its compelling

interest of preserving the integrity of the electoral process. The legitimacy and strength of this compelling interest more than offset the burden, if any, on Petitioners. Therefore, even applying the *Anderson* balancing test, as Petitioners insist, the Indiana law should be upheld.

CONCLUSION

This Court should affirm the holding of the Seventh Circuit, which upheld the constitutionality of the Indiana law.

Respectfully submitted:

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AMICUS CURIAE BRIEF

Nos. 07-21 & 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents,

&

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*
Respondents.

On Appeal from the United States Court Of Appeals for the Seventh Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF has an extensive history of participation in efforts to eradicate barriers to the full political participation of African Americans and to eliminate racial discrimination from the political process. LDF has represented parties or participated as amicus curiae in numerous voting rights cases before this Court and the United States Courts of Appeals. *See, e.g., League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Tex. Attorney Gen.*, 501

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[1] Letter of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party in these consolidated cases authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994).

Because of its longstanding commitment to the elimination of racial discrimination in the political process and the protection of the voting rights of African Americans, LDF has an interest in these appeals, which present important issues concerning minority voters' ability to meaningfully access the political process in the face of Indiana's adoption of a government-issued photo identification requirement.

SUMMARY OF ARGUMENT

Although the Court of Appeals seems to trivialize the value of the right to vote, describing "the benefits of voting to the individual" as "elusive," *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), that characterization is plainly contrary to the Constitution and this Court's jurisprudence. Instead, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civic and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The Indiana statute at issue in these cases demands, therefore, not only a searching review of the burden imposed on individuals, but also consideration of the disproportionate burdens faced by voters who have enjoyed unfettered access to the vote as a result of this Court's precedents.

We agree with petitioners that the impact on some individuals — effective vote denial — is significant and requires Indiana's law to be

invalidated. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). We urge the Court to consider the likelihood that laws like Indiana's photo identification requirement will disfranchise some of the most vulnerable communities in our nation, whose access to the ballot is critical to the integrity of our participatory democracy.

Millions of Americans do not possess the form of government-issued photo identification required under Indiana's law, and that group is disproportionately poor and minority. Accordingly, the impact of laws like Indiana's, which conditions the right to vote on the presentation of identification, will effectively fence out of the electorate significant numbers of African Americans, and will have a particularly burdensome impact in the places where impoverished African Americans are concentrated. Significantly, Indiana's law stands as a barrier not only to voters who have previously participated under state voting standards that afforded greater access, as also to the political mobilization of eligible, but yet unregistered citizens whose right to participate is of no less constitutional import.

The demographic profile of Indiana bears this out. Although Indiana's law requiring the presentation of government-issued photo identification may not, at first glance, appear to have a pernicious impact, poor African Americans will bear the burden of the restriction more than any other group.

Moreover, because there can be no question that areas of concentrated poverty include a disproportionately high number of citizens who lack the type of identification that would meet the

demands of Indiana's law, there is significant reason for concern that the adoption of similar photo identification requirements would have an extraordinary impact at the local level in many places. Such statutes would threaten to disfranchise significant portions of the electorate in many cities and counties.

Taken together, the primacy of voting in our democracy, the stringency of the Indiana law, and the reality that the franchise has long provided our nation's socio-economically disadvantaged racial minorities with the only tangible means of accessing the political process and asserting their interests, should lead this Court to employ its strictest review and invalidate the statute.

ARGUMENT

I. The Proliferation of Photo Identification Laws Like Indiana's Would Have A Devastating Impact on Access to the Franchise for Many Poor African Americans.

Stringent photo identification laws like Indiana's, which condition access to the franchise on the presentation of government issued photo identification, present extraordinary barriers to the most marginalized individuals in American society.

Although the Indiana photo identification law may not have a significant impact on the rights of some voters, its impact on the rights of poor citizens, who are disproportionately African American, is significant. Certainly, a segment of the population of Indiana carries identification deemed sufficient to

satisfy the strictures of the Indiana law. Just as certainly, however, there are significant segments of the population that do not possess the necessary documentation, and many of these persons face real-world barriers in obtaining it. The reality faced by those who possess qualifying identification may be a world apart from those who do not and will not.

Indeed, recent experience provided powerful reminders that socio-economic disadvantage can have very serious consequences. As President Bush observed following Hurricane Katrina:

> [T]here's also some deep, persistent poverty in the region . . . . That poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America.

Press Release, President Discusses Hurricane Relief in Address to the Nation, (Sept. 15, 2005), http://www.whitehouse.gov/new/releases/2005/09/20050915-8.html.

President Bush's reference to the social and political reality of New Orleans' African-American poor, exposed to the world in the wake of Hurricane Katrina, could have just as easily referred to any of the countless communities across the United States where African Americans are segregated and live in concentrated poverty.

People who live in concentrated poverty are disproportionately poor, underemployed, have less education and wealth, and lower rates of access to quality healthcare. Whatever doubts existed before the flood waters inundated New Orleans, it quickly became clear that significant numbers of the city's

residents simply did not have the resources to evacuate when Katrina loomed. Although some tried to sound the alarm before the storm about the desperate condition of that group — for example, the Times-Picayune reported that approximately 134,000 New Orleanians would be unable to access transportation and evacuate in the face of a major hurricane — those warnings were obviously not heeded. Bruce Nolan, *In Storm, N.O Wants No One Left Behind; Number of People Without Cars Makes Evacuation Difficult*, TIMES-PICAYUNE, July 24, 2005, at 1.

Moreover, in Indiana, as in the nation, segregated African-American communities are very often defined both by race and poverty. "Despite positive trends in the 1990s, almost every major American city still contains neighborhoods that mirror the Lower Ninth Ward demographically and economically." Alan Berube & Bruce Katz, Brookings Institution, *Katrina's Window: Confronting Concentrated Poverty Across America*, (Oct. 2005), ("*Katrina's Window*") http://www.brookings.edu/metro/pubs/20051012_Concentratedpoverty.pdf. Among them is Indianapolis, which has three "extreme poverty neighborhoods," *i.e.*, census tracts in which at least 40 percent of the population lives in families with incomes below the federal poverty threshold." *Id.* (App. A). African Americans in these neighborhoods have the highest concentrated poverty rate as compared to whites and Latinos in Indianapolis. *Id.* In addition, Gary, Indiana is among the most segregated metropolitan areas in the country. *See* Bill Dolan, *The Great Divide*, N.W. IND. & ILL. TIMES (Dec. 10, 2006), *available at* http://www.nwitimes.com/articles/2006/

12/10/news/top_news/9127e826329a71ca8625723f0082d99d.txt.

Critical to the analysis of laws like Indiana's that limit access to the franchise is the Constitution's demand that no class of voters be systematically excluded from the franchise. Aside from the Fifteenth Amendment's prohibition on "fencing Negro citizens out" of the ballot box, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), the Fourteenth Amendment demands "strict review of statutes distributing the franchise." *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972). "[S]trict review" is particularly important when such statutes may have a discriminatory impact. *See Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring); *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 & n.15 (1983); *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

In America, which continues to be marked by intense racial and economic segregation, the franchise is the one tool that places citizens on equal footing with all others. Moreover, in areas of concentrated poverty, African-American suffrage has always been a key element for providing access to the political, social and economic capital necessary to bring about change. Laws like Indiana's place such onerous burdens on access to the ballot box for these voters.

Race remains a barometer of social, political, and economic opportunity in America. And, although some African Americans have made significant progress, widespread racial inequality persists. For example, the African-American poverty rate is among the highest of all races at 24.9 percent.

and nearly three times the poverty rate for whites, which is 8.3 percent. National Urban League Equality Index *in* THE STATE OF BLACK AMERICA 2007 17, 20 (Stephanie J. Jones, ed., 2007). Similarly, the African-American unemployment rate is nearly twice the unemployment rate for whites. *Id.* at 23. This limitation on economic equality also influences other areas. African Americans are more likely to rely on public transportation than whites, *id.* at 24, more likely to lead single parent households than their white counterparts, DOUGLASS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 140 (1993), and, if they can obtain employment, more likely to live outside the community where they are employed. Sean B. Seymore, *Set the Captives Free! Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 GEO. MASON U. CIV. RTS. L.J. 57, 70 (2005).

It is the combination of poverty and racial segregation, however, that exacerbates the critical dividing line that race plays in American society. The persistence of segregation is particularly striking among African Americans despite increasing racial diversity in the nation as a whole. As described in a seminal work on the topic:

> No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large cities for the past fifty years. . . . Not only is the depth of black segregation unprecedented and utterly unique compared with that of other groups, but it

> shows little sign of change with the passage of time or improvements in socioeconomic status.

MASSEY & DENTON at 2.

Recent data reveals that little, if anything, has changed since Massey and Denton described this phenomenon in 1993. A recent review of census data revealed that "[t]he 1980 to 2000 period saw moderate declines in black-white segregation, though blacks continued to be highly segregated and more segregated from non-Hispanic whites than other groups." John Iceland, *Racial and Ethnic Residential Segregation and the Role of Socioeconomic Status, 1980-2000*, *in* FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING & FAIRNESS 107, 117 (John Goering ed., 2007). Indeed, African Americans remain the most residentially segregated group in the United States. John Iceland et al., *U.S. Census Bureau, Racial and Ethnic Segregation in the Untied States: 1980-2000* at 95 (2002), *available at* http://www.census.gov/hhes/www/housing/housing_patterns/pdf/ch7.pdf.

Some laws can have the effect of amplifying residential segregation, concentrated poverty, and their resulting social disadvantages, and transfer inequality into the political process. As described by two scholars:

> Participation in electoral politics is costly. Without money, it is impossible to contribute financially to a campaign. Without time, energy, transportation, and child care, it is difficult, even impossible, to volunteer to work for a candidate. Even the simple act of voting requires people to register, to gather and

> digest a mass of information about the candidates, to make choices, and to get to the polls come election day. Participation in electoral campaigns puts many strains on people's resources, and people with ample resources are better able to participate than people with meager resources.

STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 133-34 (1993). In short, the legacy of official discrimination against African Americans in the United States continues to have an appreciable impact on the lives of African Americans, particularly those who live in areas with concentrated poverty, which restricts their ability to vote.

Voter identification laws like Indiana's will, therefore, have a disproportionate impact on African Americans. In striking comparison to a former Virginia law that required presentation of a certificate indicating payment of a poll tax before adult citizens could vote, the Indiana photo identification law will "tend[] to eliminate from the franchise a substantial number of voters who did not plan so far ahead." *Harman v. Forssenius*, 380 U.S. 528, 539-40 (1965).

II. Photo Identification Laws Create Constitutionally Forbidden Restrictions on the Right to Vote that Disparately Impact African Americans.

Given that the communities in which many poor African Americans live are characterized by tremendous disadvantage, access to the franchise is

critically important. Indeed, exercise of the franchise represents one of the few vehicles available to impact or change the very fragile conditions faced by many African Americans who remain isolated in inner cities characterized by concentrated poverty.

This Court cogently described the importance of the interest in the franchise for African-American residents of Indianapolis over 35 years ago: "There exists within Marion County an identifiable racial element, 'the Negro residents of the Center Township Ghetto,' with special interests in various areas of substantive law, diverging significantly from interests of nonresidents of the ghetto." *Whitcomb v. Chavis*, 403 U.S. 124, 134-35 (1971). "These Negro residents have interests in areas of substantive law such as housing regulations, sanitation, welfare programs . . . garnishment statutes, and unemployment compensation, among others, which diverge significantly from the interests of nonresidents of the Ghetto." *Id.* at 135 n.12 (internal quotation marks omitted). Today, the social disadvantage plaguing the African-American residents of Marion County bears striking resemblance to the conditions they faced over 35 years ago. Thus, unfettered access to the ballot box remains a crucial method — and perhaps the only realistic one — for marginalized African-American communities in Indianapolis, and others similarly situated, to pursue the goals of racial and social equality.

In short, these citizens can least contend with barriers that restrict or deny the exercise of the right to vote, and are most likely to be excluded by requirements that condition access to the ballot box

on the presentation of photo identification. The Fourteenth and Fifteenth Amendments to the Constitution do not permit unnecessary impediments to political participation in our democratic process. Consequently, laws such as Indiana's photo identification measure, which erect clearly discernible barriers for poor African Americans, without concomitant benefits, deserve careful scrutiny.

As this Court has repeatedly explained, the right to vote is a "fundamental political right, . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Reynolds*, 377 U.S. at 562. Any measures that serve to restrict a certain class of otherwise eligible citizens from the franchise are therefore subject to strict review. "In decision after decision, this Court has made clear that that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336. The right to vote has never been dependent upon a voter's station in life, viewpoint, or intelligence, and any qualifications that would impose such preconditions can not survive scrutiny under this Court's precedents. *See id.* at 355-60 (citing, *inter alia*, *Evans v. Cornman*, 398 U.S. 419 (1970); *Ciriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969)).

Therefore, election regulations that serve to "fenc[e] out from the franchise," entire classes of people otherwise eligible to vote threaten the "'[e]xercise of rights so vital to the maintenance of

democratic institutions.'" *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)). The Fourteenth Amendment demands that the right to vote is not limited to citizens at the center of our society but extends to our most marginalized. Thus, a regulation that unnecessarily excludes eligible voters from the franchise must be carefully reviewed. *See Purcell v. Gonzalez*, 126 S. Ct. 5, 7 (2006) (*per curiam*) ("[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges."); *Dunn*, 405 U.S. at 336 ("[A]s a general matter, before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." (internal quotation marks and citation omitted)). This close review is required because of the severity of the restriction on the right to vote, *i.e.*, effective vote denial. *See Burdick*, 504 U.S. at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."); *Dunn*, 405 U.S. at 336. An appropriate analysis ensures that a state regulation does not create barriers that fence out those voters who face the greatest difficulty in satisfying the requirement, regardless of whether the burden is attributable to their poverty, limited time, or limited mobility. *Cf. Harper v. Virginia*, 383 U.S. 663, 667-68 (1966) (discussing financial impediments to the ballot).

Statutes like Indiana's that selectively limit the franchise and pose the "danger . . . of denying some citizens any effective voice in the governmental

affairs which substantially affect their lives," *Kramer*, 395 U.S. at 626-27, warrant particular concern because of their targeted impact. *See Clingman*, 544 U.S. at 603 (O'Connor, J., concurring); *Anderson*, 460 U.S. at 792-93 & n.15; *Bullock*, 405 U.S. at 144.

III. Indiana's Government-Issued Photo Identification Requirement Will Exclude Otherwise Qualified Voters from the Franchise, and Have a Disparate Impact on African Americans.

A. The Class of Citizens Effectively Disfranchised by Photo Identification Laws Like Indiana's Is Disproportionately African-American.

All the available evidence indicates that the most marginalized African-American communities, where the poor are concentrated, are least likely to overcome the barriers imposed by stringent photo identification laws like Indiana's.

Nationally, "6 to 10 percent of the American electorate does not have official state identification." *To Assure Pride and Confidence – Task Force Reports to Accompany the Report of the National Commission on Election Reform*, Chapter I – Verification of Identity, at 4 (2001), *available at* http://millercenter.virigina.edu/programs/natl_commissions/commission_final_report/task_force_report/complete.pdf. However, that part of the citizenry is not evenly distributed across racial and income groups. A recent national survey found that 25 percent of African-American voting age citizens have

no current government-issued photo ID, compared to 8 percent of white voting-age citizens. Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), at 3, *available at* http://www.vote.caltech.edu/VoterID/CitizensWithoutProof.pdf.[2] Moreover, the same study found that "[c]itizens earning less than $35,000 per year are more than twice as likely to lack current government-issued photo identification as those earning more than $35,000." *Id.*

Other studies demonstrate similar disparities. In Georgia, for example, African-American registered voters are nearly twice as likely to be without driver's licenses as white registered voters. M.V. Hood, III & Charles S. Bullock, III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 15 (Apr. 2007), http://www.vote.caltech.edu/VoterID/GAVoterID(BullockHood).pdf. In addition, rural and urban Georgia voters were less likely to possess a driver's license than suburban voters. *Id.* at 16.

Similarly, a study of California, New Mexico and Washington voters found that minority voters are less likely to have various forms of identification, such as driver's licenses, birth certificates, or bank statements. Matt A. Barreto, Stephen A. Nuño, Gabriel R. Sanchez, *Voter ID Requirements and the*

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[2] This conclusion is consistent with the results of the U.S. Department of Transportation's 2001 National Household Travel Survey revealed that only 57 percent of African-Americans are drivers, as compared to 73 percent of whites. *See* National Household Travel Survey (2001), *available at* http://nhts.ornl.gov.

Disenfranchisements of Latino, Black and Asian Voters, Am. Pol. Sci. Ass'n Presentation (Sept. 1, 2007).

In addition, statutes that condition access to the ballot on the presentation of government-issued photo identification, like other restrictive prerequisites and burdens that have been tied to voting historically, will constrict the size of the electorate and present a barrier to the franchise for both registered and unregistered citizens. Numerous political scientists have found a correlation between the number and complexity of qualifications tied to the exercise of the franchise and depressed turnout and participation rates.[3]

Empirical evidence demonstrates that turnout declines as administrative barriers to voting, such as voter registration requirements, are erected. *See* RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 61 (1980). In addition, some commentators assert that registration laws are the primary reason voting rates vary according to socio-economic status. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 117-18 (1988).

Therefore, it is reasonable to conclude that a law like Indiana's demanding the acquisition of government-issued photo identification for those who do not have it, or maintaining a valid one, like

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[3] It is also worth noting that *any* photo identification that might allow a voter to cast a ballot is likely to be difficult to obtain for poor people. We concentrate our discussion on driver's license possession here because it is the type of photo identification most likely to fulfill the Indiana statute's requirement because it is the most available.

registration, "raises the costs of voting," WOLFINGER & ROSENSTONE, at 61, and will operate to depress turnout. In stark contrast, one study of three states allowing Election Day registration, found an increase in average turnout and participation rates. Craig Leonard Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170 (2001).

The *Crawford* petitioners have discussed at length the barriers that a voter may encounter when attempting to procure such identification and the particular difficulty for those who lack resources, and we will not repeat them here. *See* Br. of *Crawford* Pet'rs at 15-19. The Missouri Supreme Court's analysis of the difficulties of obtaining photo identification applies, however, with equal force everywhere that Americans live in poverty. There, the court found that "for Missourians who live beneath the poverty line, the $15 they must pay in order to obtain their birth certificates and vote is $15 that they must subtract from their meager ability to feed, shelter and clothe their families." *Weinschenk v. State*, 203 S.W.2d 201, 214 (Mo. 2006).

The cost imposed by a government issued photo identification requirement is not limited to the fee one must pay to obtain or renew the identification or underlying documents. Such requirements also strip voters with limited means of the ability to participate in elections in the only realistic way members of marginalized communities

exercise influence over the political process — casting a vote that counts.[4]

In sum, all data strongly support an inference that laws like Indiana's that require the presentation of government issued photo identification as a prerequisite for in-person voting will have a significant disparate impact on African Americans, particularly in areas of concentrated poverty.[5]

B. The Combination of Intense Segregation and Photo Identification Laws Could Erode Participatory Democracy at the Local Level in Many American Cities.

Aside from the burden imposed on the right to vote described above, photo identification laws like Indiana's have the potential to disfranchise significant portions of the electorate in local elections. A conclusive study of driver's license possession in Wisconsin confirms this suspicion, and

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[4] Typically, impoverished inner city residents do not make campaign contributions, or encounter living room fundraisers in their neighborhoods. For example, in the 2000 presidential election cycle, "people of color were grossly underrepresented, not only among contributors of amounts over $200, but also among contributors of $100 or less." Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 102 & n.109, 118 n.162 (2004) (noting that approximately 96 percent of donors in the 2000 election cycle who contributed over $200 were white).

[5] Though the impact in urban centers may be most concentrated, the impact on poor African Americans in rural and other settings is significant as well.

foretells what could become a national problem with the adoption of restrictive photo identification laws like Indiana's in urban areas throughout the country.

Wisconsin is an appropriate example because it is a state with a significantly segregated African-American population. The state is only 5.9 percent African-American, but over 73 percent of the state's African-American population resides in Milwaukee County. *See* U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/55/55079.html. Milwaukee County's most densely populated area, the City of Milwaukee, is 37.3 percent African-American, and contains 42 extreme poverty census tracts, where at least 40 percent of the population reside in households with incomes below the federal poverty threshold. *Katrina's Window*, App. A. A disproportionate number of these families are African-American. *Id.*

Although 80 percent of men and 81 percent of women have valid driver's licenses statewide, only 45 percent of African-American men, and 51 percent of African-American women have valid driver's licenses. John Pawasarat, Employment and Training Institute, University of Wisconsin-Milwaukee, *The Driver's License Status of the Voting Age Population in Wisconsin*, 3 (June 2005), www.uwm.edu/ETI/ barriers/DriversLicense.pdf. This disparity is similarly stark in Milwaukee County, where 73 percent of white residents, but just 47 percent of African Americans have valid driver's licenses. *Id.* at 22.

Applying a law like Indiana's to an electorate like Milwaukee's would effectively disfranchise a

significant portion of the city's African-American citizenry. Such a law would, therefore, effectively and dramatically shrink the size of the electorate in races for Milwaukee's mayor, city council, and other elected positions and increase the weight of votes cast by those who could satisfy the voter identification requirement.

The disparities in driver's license possession in Wisconsin strongly support the inference that the citizens of racially isolated and impoverished urban centers are likely to be excluded from the franchise at a disparate rate, and thereby fenced out of the state's democratic process. Such laws pose precisely the type of threat to the "legitimacy of representative government" that compromises the integrity of our democracy. *See Kramer*, 395 U.S. at 626.

CONCLUSION

African Americans isolated in communities characterized by concentrated poverty are less likely to possess government-issued photo identification. As a result, voter identification requirements like Indiana's deny marginalized communities the opportunity to participate equally in the political process and undermine the principles at the root of our participatory democracy. For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

WILLIAM CRAWFORD, ET AL.,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, ET AL.,

Respondents.

INDIANA DEMOCRATIC PARTY, ET AL.,

Petitioners,

v.

TODD ROKITA, IN HIS OFFICIAL CAPACITY AS INDIANA SECRETARY OF STATE, ET AL.,

Respondents.

On Writs of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, NAVAJO NATION, AND AGNES LAUGHTER IN SUPPORT OF PETITIONERS

[Impact on Native Americans]

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization representing the interests of American Indians. NCAI's membership includes 250 Indian tribes and their members, which account for approximately 72% of all enrolled tribal members in the United States.[2]

Amicus Navajo Nation is a federally recognized Indian tribe and is the largest tribe in the United States, comprising over 250,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[3] The Navajo Nation is one of several plaintiffs in an

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1 The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

2 NCAI member the Pokagon Band of Potawatomi Indians' service area includes six counties in northern Indiana: "The Band's service area shall consist of the Michigan counties of Allegan, Berrien, Van Buren, and Cass and the Indiana counties of La Porte, St. Joseph, Elkhart, Starke, Marshall, and Kosciusko." 25 U.S.C. § 1300j-6 (2000).

3 According to the 2000 U.S. Census, approximately 180,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. Census Bureau, NAVAJO RESERVATION DEMOGRAPHIC PROFILE: 2000, Table DP-1, *available at* http://censtats.census.gov/data/US/502430.pdf.

action currently pending in the District of Arizona that challenges Arizona's voter ID statute.[4]

Amicus Agnes Laughter is an elderly Navajo woman from rural Chilchinbeto, Arizona, who was denied the right to vote in the 2006 Arizona primary and general elections because she was unable to present a valid form of identification to poll workers. Ms. Laughter is a co-plaintiff with the Navajo Nation in its challenge to the Arizona voter ID statute.

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[4] *Navajo Nation, et al. v. Jan Brewer*, 06-1575 (D. Ariz.). After the Navajo Nation filed its lawsuit, the case was consolidated with the other challenges to the Arizona statute, and all plaintiffs filed motions for preliminary injunction. The day before the 2006 Primary Election, the district court denied the plaintiffs' motions for preliminary injunction and ordered supplemental briefing to re-examine the Navajo Nation Plaintiffs' Voting Rights Act and Civil Rights Act claims. *Gonzalez v. Arizona*, Nos. CV 06-1268, 06-1362 & 06-1575, 2006 U.S. Dist. LEXIS 93477 (D. Ariz. Sept. 11, 2006). On appeal, the motions panel of the Ninth Circuit enjoined the voter identification requirement for the 2006 General Election. This Court vacated the injunction because the motions panel failed to provide reasons for its action and the Court could not determine whether the motions panel had given appropriate deference to the district court. *See Purcell v. Gonzalez*, 127 S. Ct. 5 (2006). The district court subsequently denied the Navajo Nation's motion for preliminary injunction. At a recent scheduling conference, the district court judge informed the parties that she will not schedule a trial date until this Court decides the constitutionality of the Indiana voter identification statute. The three consolidated cases are captioned *Gonzalez v. Arizona*, Nos. CV 06-1268, 06-1362 & 06-1575 (D. Ariz.).

NCAI, the Navajo Nation, and Ms. Laughter file this brief as *amici curiae* because at least one in five Native Americans, including Ms. Laughter, does not have a photo ID issued by a state or the federal government. Many American Indians and Alaska Natives, particularly elders, continue to live traditional lifestyles in small communities in rural and remote areas where they rely on a combination of tribal and federal services for Native Americans that do not require any form of identification. In addition, many tribal members use tribal-government-issued ID cards as their sole form of ID when they need an ID for travel, voting, or business. Many lack the birth certificates—or even utility bills—necessary to obtain state ID cards. Rural locations, language assistance needs, and poverty create additional barriers to obtaining state-issued identification.

Amici agree with Petitioners that the Indiana statute is unconstitutional. Moreover, *Amici* are concerned that if the decisions below are affirmed, other states where there are large American Indian and Alaska Native populations will be encouraged to pass similarly restrictive voter identification statutes. This would disenfranchise many American Indian and Alaska Native voters who cannot shoulder the financial and administrative burdens associated with obtaining a photo ID issued by a state or the federal government.

SUMMARY OF ARGUMENT

Voter ID statutes place a severe and disproportionate burden on otherwise eligible

American Indian and Native Alaskan voters. Nationally, at least one in five voting-age Native Americans lacks a photo ID issued by a state or the federal government. These Americans' participation in local, state, and national elections has increased steadily since Congress passed the Voting Rights Act in 1965.[5] Because these Americans have never had the need for, nor access to, a photo ID issued by a state or the federal government, however, they once again find themselves in danger of being disenfranchised. In light of the burden the Indiana statute places on Native Americans—in light of the burden it places on all Americans—the Court should find that the statute violates the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I. NATIONALLY, ONE IN FIVE VOTING-AGE AMERICAN INDIANS DOES NOT HAVE A PHOTO ID ISSUED BY A STATE OR THE FEDERAL GOVERNMENT.

Last year, *Amicus* Agnes Laughter, an elderly Navajo woman from rural Chilchinbeto, Arizona, was denied the right to vote in the Arizona primary and general elections because she was unable to present a valid form of identification to poll workers. Her experience is all too common among Native Americans.

Like the Indiana statute, Arizona currently requires all voters to present identification at the

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5 42 U.S.C. §§ 1971, *et seq.* (Supp. 2007).

polls before casting a ballot.[6] Arizona is less strict than Indiana in that Arizona permits voters to cast a ballot if they otherwise can produce either (1) a government-issued photo ID with the elector's name and registration address or (2) two of the following forms of identification with the voter's name and registration address: current utility bill, bank or credit union statement, Indian census card, property tax statement, tribal enrollment card or tribal identification, vehicle insurance card, or a recorder's certificate.[7] Next to Indiana, Arizona's statute is one of the strictest in the country.[8] Like the Indiana statute, the Arizona statute places a difficult burden on Native Americans like Agnes Laughter.

Prior to the Arizona statute's enactment in 2004, Ms. Laughter voted in nearly all tribal, state, and federal elections since this Court enjoined Arizona's

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6 Ariz. Rev. Stat. Ann. § 16-579 (2006).

7 The Arizona Secretary of State adopted a list of documents acceptable under the statute, limiting the types of documents allowable under the new voter identification requirements. Arizona Secretary of State Jan Brewer, Proof of Identification at the Polls, http://www.azsos.gov/election/Prop_200/poll_identification.htm (last visited Nov. 11, 2007).

8 As enacted, Missouri's voter ID statute was similar to Indiana's, accepting only certain photo IDs issued by the state or the federal government. Mo. Rev. Stat. § 115.427 (2006). In 2006, however, the Missouri Supreme Court found that the statute violated the Missouri Constitution, observing that it placed a substantial burden on the fundamental right to vote, was thus subject to strict scrutiny, and was not narrowly tailored. *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

literacy test in *Oregon v. Mitchell*, 400 U.S. 112 (1970), clearing the way for Navajos like Ms. Laughter to exercise their rights to vote.[9]

On September 12, 2006, Ms. Laughter went to vote at her usual polling location, the Chilchinbeto Chapter House.[10] Two poll officials greeted her immediately and asked if she had identification. She did not. They told her to wait outside while they went inside the Chapter House to speak with someone. Five minutes later, they emerged and invited her into the polling station. Inside, Mary Yazzie, a poll worker, recognized Ms. Laughter and greeted her in the Navajo language. Ms. Yazzie acknowledged Ms. Laughter as her older sister through their maternal clan Red-Running-into-the-Water. Ms. Laughter and her family are well known in the community. Her son is the Chilchinbeto Chapter Vice President. Nevertheless, Ms. Laughter was not permitted to vote. The election officials, conscientious of their official duties and despite their ability to personally confirm her identity, could not

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9 At the time, the Court observed that "Arizona has a serious problem of deficient voter registration among Indians." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

10 Chilchinbeto is located north of the Navajo-Hopi partitioned lands, in the middle of the Navajo Reservation. According to the 2000 Census, Chilchinbeto has a population of 1,325. LSR Innovations, CHAPTER IMAGES: 2004, PROFILES OF 110 NAVAJO NATION CHAPTERS 63 (Navajo Nation Div. of Community Development 2004), *available at* http://chilchinbeto.nndes.org/cms/kunde/rts/chilchinbetonndesorg/docs/429374980-09-27-2004-14-01-27o.pdf.

allow Ms. Laughter to circumvent the statutory identification requirement.

Agnes Laughter's lack of qualifying identification is representative of a significant number of American Indians across the country who, like Ms. Laughter, have no form of photo ID whatsoever. Many others have only the photo IDs that some tribal governments issue to their members,[11] and these do not qualify under the Indiana statute because they were not issued by a state or the federal government.

Moreover, as discussed below, for traditional American Indians and Alaska Natives living on rural reservations, it is no easier to acquire the other documents that states like Arizona accept as valid

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[11] *Amicus* Navajo Nation does not issue tribal IDs to its members. Members do not need identification to obtain services on the Navajo Reservation or to vote in tribal elections. Under the Navajo belief system, identity is confirmed through the traditional kinship system, which is used in the everyday life of Navajos. Testimony of Leonard Gorman, Prel. Inj. Hr'g Tr. 58, 60-63, in *Gonzales v. Arizona*, No. 06-1268 (D. Ariz. Aug. 30, 2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitEx120.pdf. The Navajo Nation has considered creating ID cards but has not done so because of the expense to institute and run such a program. To issue tribal ID cards, the Navajo Nation would be required to create an office and allocate operating funds in at least each of the five agencies located on the Navajo Reservation. After Arizona developed voter ID requirements, the Navajo Nation considered creating a tribal ID program and requested monetary assistance from the Arizona legislature to develop such a system, but it received no offer of assistance.

identification than it would be to obtain a photo ID issued by a state or the federal government. During the 2006 election cycle, 428 Navajos living on the Navajo Reservation in Arizona completed conditional provisional ballots that were never verified with one of the statutory forms of identification, and, therefore, were never counted.[12]

Amicus NCAI estimates that if the rest of the states were to amend their voter identification laws to require a photo ID issued by a state or the federal government, over 20% of otherwise eligible Native Americans would no longer be able to vote.

II. MANY AMERICAN INDIANS AND ALASKA NATIVES LIVE IN COMMUNITIES WHERE THEY HAVE NEVER NEEDED A PHOTO ID, AND IT IS A SEVERE BURDEN FOR THEM TO OBTAIN PHOTO ID CARDS ISSUED BY THE STATE AND FEDERAL GOVERNMENTS.

In its opinion, the court of appeals expressed incredulity that anyone can function in today's society without obtaining some form of identification. Although this may be true for a majority of Americans, many American Indians and Alaska Natives, particularly elders such as Amicus Agnes

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[12] This number does not include individuals who did not fill out a provisional ballot because they knew they would not be able to return and produce the required identification. Some Navajo elders reported that they would not be voting in elections due to the voter identification requirements, and election day technicians in Coconino County, Arizona observed individuals who entered the polling place and walked out without voting during the 2006 Arizona Primary Election.

Laughter, continue to live in traditional ways in rural and remote areas, in small communities, and rely upon a combination of tribal and federal services that do not require any form of identification. Moreover, many American Indians and Alaska Natives lack the underlying documentation needed to obtain a photo ID issued by a state or the federal government. The associated information and transaction costs make obtaining a state- or federal-issued ID card for the purposes of voting infeasible, if not impossible for a substantial number of American Indians and Alaska Natives. Ms. Laughter, for example, traveled to several locations, approximately 90-115 miles from her home, in unsuccessful attempts to obtain identification. She failed to obtain a state ID because she lacks the underlying documents, specifically a birth certificate.

Many people who visit Indian reservations get an impression of going back in time to an earlier era. The economy on most reservations is a cash economy, where paychecks and government checks are cashed at local stores and businesses. Hunting, fishing, gathering, and gardening for subsistence still form an important part of the culture and diet. Large families live close to each other, and food and resources are shared. Homes are often heated with firewood, and water comes from wells or is hauled from streams. In these close-knit rural communities, ID cards are not needed for everyday life, much as

they were unnecessary for all Americans throughout most of our country's history.[13]

Requiring American Indians and Alaska Natives to obtain a state or federal ID for the sole purpose of voting imposes a severe financial and administrative burden on their rights to vote and disenfranchises those who cannot readily shoulder this burden.

A. Many American Indians and Alaska Natives Lack Access to the Underlying Documents Required to Obtain State and Federal ID Cards.

American Indians and Alaska Natives are much more likely than the general population to lack the underlying documentation (*e.g.*, birth certificate, utility bills, bank statements, other proof of residence) required to obtain a state- or federal-issued ID card.

Many Native Americans were born at home and do not possess a birth certificate.[14] In addition, the Indian Health Service did not start issuing birth

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[13] Nor do tribal members typically need state ID cards to purchase restricted commercial products, such as hunting or fishing licenses, firearms, ammunition, alcohol, or tobacco on reservations. In the rural communities around Indian reservations, most businesses do not require identification of well-known or elderly persons, and they otherwise will accept tribal or BIA identification cards.

[14] T. Vanderpool, *Rites of Passage*, TUCSON WEEKLY, Feb. 23, 2007 ("With our way of life here on the reservation, we don't always have documents," says Henry Ramon, vice chairman of the Tohono O'odham Nation. "We were born in our homes, and don't have (birth certificates). Even those who volunteered to fight in the war don't have birth certificates.").

certificates until the 1960's. In a survey conducted by *Amicus* NCAI, tribal leaders reported that 20% of the reservation population does not have a birth certificate. By example, the Tohono O'odham Nation in Arizona estimates that approximately 7,000 members (of their 28,000 members) were born at home, not in a hospital, and are unable to meet the statutory requirements to obtain a birth certificate.[15] In addition, of those Native children who were born in Indian hospitals, there were long periods of time when the Indian Health Service simply entered "Indian Boy" or "Indian Girl" on a birth certificate, therefore rendering the birth certificate largely useless for identification purposes. Requesting a "delayed birth certificate" or correcting the name on an existing birth certificate can be a very time-consuming and costly process. The State of Arizona, for example, cautions that "filing for a Delayed Birth Certificate can be a lengthy process, taking up to one year to complete."[16]

American Indians living on reservations are much more likely to have no traditional street address,

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[15] NCAI Comments to Notice of Proposed Rulemaking: Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere (WHTI-Land Regs) (August 27, 2007), *available at* http://www.ncai.org/ncai/whti/NCAICommentsWHTINPRMAugust2007FINAL.pdf.

[16] Office of Vital Records, Div. of Public Health Services, Arizona Dept. of Health Services, Delayed Birth Certificates, http://www.azdhs.gov/vitalrcd/delayed_birth.htm (last visited Nov. 9, 2007).

utility bills, lease, or other documentation commonly required by states to prove residency. Of the nearly 56,000 miles of Indian reservation roads, over two-thirds are unimproved dirt or gravel roads. Only 11.6% of the roads are found to be in "good condition" and many miles of these roads are impassable after rain or snow.[17] Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. As a result, most reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents may have to travel up to seventy miles in one direction to receive mail. A significant number of these reservation residents have no traditional street addresses.

In addition, Native people are much more likely than the general population to live without many of the utilities common in most American households. Thus, these Americans have no utility bills to prove their identity or residence. Approximately "14.2 percent of Indian households have no access to electricity, as compared to only 1.4 percent of all U.S. households. The Navajo Nation alone accounts for 75 percent of the households without

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[17] Bureau of Indian Affairs, TEA—21 REAUTHORIZATION RESOURCE PAPER: TRANSPORTATION SERVING NATIVE AMERICAN LANDS (May 2003).

electricity."[18] Nearly 20 percent have no phone service, compared with 2.4 percent nationally. Native American homes are also ten times more likely to be overcrowded than other American homes, further increasing the likelihood that an eligible voter will be living in someone else's home or another situation where he or she has no documentation to prove residence.[19]

Native people living on reservations are also much less likely than other Americans to have a traditional bank account. Only 14 percent of Indian communities (excluding Alaska) have a financial institution in the community and 15 percent of Native people must travel more than 100 miles to reach a bank or automatic teller machine.[20] However, over 200,000 American Indians have BIA trust accounts that provide income from leasing or sale of land and natural resources. These accounts are often used in lieu of a bank account, and also do

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18 President's Fiscal Year 2005 Budget Request for Indian Programs: Hearing Before the S. Comm. on Indian Affairs, 108th Cong. (2004) (testimony of David K. Garman, Ass't Sec'y U.S. Dep't of Energy Office of Energy, Efficiency and Renewable Energy), *available at* http://www1.eere.energy.gov/office_eere/congressional_test_022504.html.

19 National American Indian Housing Council, TOO FEW ROOMS: RESIDENTIAL CROWDING IN NATIVE AMERICAN COMMUNITIES AND ALASKA NATIVE VILLAGES (2001), *available at* http://www.naihc.net/research/index.asp.

20 Community Development Finance Institution Fund, U.S. Treasury Dept., REPORT OF THE NATIVE AMERICAN LENDING STUDY 14 (2001), *available at* http://www.cdfifund.gov/what_we_do/nacd/lending_study.asp.

not require the use of an identification card. Bills are often paid in cash or with money orders. Well-known persons in small communities often do not need identification to cash checks, and they can otherwise use tribal or BIA identification cards.

Amicus Agnes Laughter has tried on two occasions to obtain a state photo ID card, but she was denied on both occasions because she does not have a birth certificate. She also does not have utility bills in her name. Like many people in her community, her husband built their home, which has no electricity, no running water, and is heated with firewood. Her home is on a dirt road three miles from the nearest paved highway. She does not drive; she relies on her husband and other family members for transportation. In the past, before the passage of Arizona's current voter ID statute, her identity at the polls was verified with her inked thumbprint on her ballot.

B. Many American Indians and Alaska Natives Lack Access to the Language Assistance They Need to Obtain State and Federal Identification.

Language barriers create additional challenges for American Indians and Alaska Natives, who need language assistance to obtain a photo ID. Data from the 2000 census indicates that American Indians and Alaska Natives are at least twice as likely as other Americans to speak English "less than very well." Although Section 203 of the Voting Rights Act ("VRA") protects the right of these Native language speakers to have access to all materials and information needed for voting in their Native

languages,[21] this protection does not extend to the services offered by state agencies that issue ID cards.

C. Many American Indians and Alaska Natives are Unable to Obtain State or Federal ID Cards Because of Poverty and Geographic Isolation.

Most states charge a fee for obtaining a state-issued ID card, with costs ranging from $5.00 to $29.00.[22] Moreover, this cost, which may be prohibitive for individuals living in severe poverty or on a fixed income, is compounded for the many American Indians and Alaska Natives who live in remote, isolated locations. Given the remote nature of many tribal communities, these costs are often substantially higher for Native Americans than they would be for individuals living in an urban setting.

For example, individuals living in a remote portion of the Navajo reservation may have to travel several hours to get to the nearest location where a state-issued ID can be obtained. The cost of gas alone may preclude individuals on a limited budget from making this trip to obtain an ID card. Of course, this is assuming that the individual has access to a car in the first place. The 2000 U.S. Census indicates that Native Americans are twice as likely to have no vehicle available to them—14%,

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21 42 U.S.C. § 1973aa-1a (Supp. 2007).

22 As explained in Rep. Keith Ellison's amicus brief, in light of these pre-requisite costs, photo ID statutes like the Indiana statute are modern-day poll taxes in violation of the Twenty-fourth Amendment.

compared with 7% in the general population—and only about 6% of tribes have a public transit system.[23]

In Alaska, in a 75,000 square mile area there is only one state office, a branch office of the Division of Motor Vehicles ("DMV"), where someone can get a driver's license or state ID card. Last year this state office was only open for two months, and this office is only accessible from many Alaska Native Villages through air travel ranging in cost from $600 to $800. Alaskan DMV offices are heavily concentrated in the more urban areas of Southeast Alaska, where the population is largely non-Native, while the Alaska Native population is concentrated in Western and Northern Alaska.[24]

The remote location of many American Indian and Alaska Native communities compounds the

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23 Bureau of Indian Affairs, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003).

24 Indian reservations in the lower 48 states are also located at great distances from state offices. In Montana, from the Blackfeet Reservation, the closest exam center is in Kalispell 178 miles away. From the Fort Peck Reservation, the closest exam center is in Plentywood, approximately 131 miles away. In South Dakota, from the Cheyenne River Reservation, the closest exam center is 60 miles away. From the Pine Ridge Reservation, the closest exam center is 45 miles away. In New Mexico, from the Zuni Pueblo, one would either go to Gallup, which is approximately 64 miles away or Grants, which is approximately 70 miles away. These distances would pose a very significant burden for that percentage of the American Indian population that does not have access to an automobile.

severe poverty Native people experience, who suffer from the highest rates of poverty in the country. According to 2000 census data,[25] American Indians and Alaska Natives living on reservations have an average real per capita income of $12,452,[26] significantly lower than the national average of $41,944. Among tribal members, 49% of the

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[25] For a number of reasons census data is problematic when talking about American Indians and Alaska Natives. The census does not differentiate between individuals who are enrolled members of a tribe and those who self-identify as American Indian or Alaska Native, but are not associated with any tribal group. Additionally, the census generally does not distinguish between American Indians and Alaska Natives who live on reservations and those who have migrated to a non-Indian community or urban area. For these reasons, it is generally assumed that the disparities in income, employment, and well-being that are reflected in the census between Natives and non-Natives would be even more severe if data existed for on-reservation communities alone. A good example of this is the unemployment statistics. According to the census, 12% of American Indian and Alaska Natives are unemployed. The BIA Labor Force Report, which covers only enrolled members of a federally-recognized Indian tribe living on or near a reservation, reports unemployment rates to be significantly higher at 49%. Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at ii (2003), *available at* http://www.doi.gov/bia/laborforce/2003LaborForceReportFinalAll.pdf (hereinafter "2003 BIA LABOR REPORT").

[26] See Trib Choudhary, NAVAJO NATION DATA FROM US CENSUS 2000, T33 – Important Data on American Indian Tribes and Alaska Natives, *available at* http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf.

available labor force is unemployed.[27] Of the 51% of tribal members who are employed, 32% earn wages below the 2003 poverty guidelines established by the United States. In Indiana, the Pokagon Band of Potowatami has 173 members eligible for services from the tribe. Of these members, 28% are unemployed and 33% of those who are employed are paid below the poverty level.[28]

III. MANY NATIVE AMERICANS RELY ON TRIBAL IDS AS THEIR SOLE FORM OF IDENTIFICATION.

Although not all tribes issue IDs to their members,[29] there are a significant number of American Indians and Alaska Natives living both on and off the reservations who rely on tribal IDs as their sole government-issued form of identification.

Tribal governments exercise inherent sovereign powers over their members and territory, and perform many traditional and modern government functions. This often includes the issuing of ID cards to members. In Indiana, for example, upon enrollment with the Pokagon Band, a member age 14 years or older is issued a membership card. Since 2001, all Pokagon membership cards contain the member's picture. Members who live within the Band's service area may visit the Band's Enrollment Office to obtain their photo membership card. Those

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27 2003 BIA LABOR REPORT, *supra* note 25, at ii.

28 *Id.* at app. (Local Estimates of Indian Service Population and Labor Market Information, at 7).

29 *Amicus* the Navajo Nation does not issue tribal IDs *See supra* note 11.

members who do not live within the Band's service area must submit a picture and signature along with a notarized statement that the picture and signature is the member's own.[30]

In light of the strong federal policy encouraging tribal sovereignty and self-determination, the federal government and most states extend comity to tribal governments and accept tribal ID cards where they otherwise would require a state or federal ID.

For example, in implementing the Intelligence Reform and Terrorism Prevention Act of 2004, the Departments of State and Homeland Security recently proposed tough new border crossing identification restrictions that nonetheless specifically permit members of U.S. border tribes to continue to cross between the U.S. and Mexico using tribal enrollment cards as identification.[31]

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30 Pokagon Band of Potawatomi Indians, Comments on Proposed Rulemaking Regarding Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from Within the Western Hemisphere (August 21, 2007), *available at* http://www.ncai.org/ncai/whti/PokagonWHTIComments.pdf. Most tribes have particularly rigid standards and procedures that must be met before a membership card will be issued, including specific requirements regarding identity and ancestry. The Pokagon Band and most other tribes also have laws in place to protect against fraud and forgery. *Id.*

31 Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from Within the Western Hemisphere, 72 Fed. Reg. 35088, 35099 (proposed June 26, 2007) (to be codified at 8 C.F.R. pts. 212 & 235, and 22 C.F.R. pts. 41 & 53).

The Help America Vote Act of 2002 (HAVA) instructs states to offer voters who are required to present identification before voting the option of showing any "current and valid photo identification," in addition to several non-photograph forms of identification.[32] Presently, eight states expressly accept tribal IDs as valid identification in state and national elections: Arizona, Georgia, Minnesota, Montana, North Dakota, South Dakota, Utah, and Washington.[33] Only Indiana and Missouri expressly limit their lists of acceptable forms of identification to photo IDs issued by the state and federal government.[34] All other states either follow the HAVA requirements or allow voters to show proof of identity through documents that have not been issued by a state or the federal government; these statutes would seem to permit poll officials to accept photo IDs issued by tribal governments.[35]

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32 42 U.S.C. § 15483(b)(2)(A) (Supp. 2007).

33 Ga. Code Ann. § 21-2-417(a)(6) (2007); Minn. Stat. § 201.061(3)(d) (2007); Mont. Code Ann. § 13-13-114(1)(a) (2007); N.D. Cent. Code § 16.1-05-07(1)(b) (2007); S.D. Codified Laws §12-18-6.1(3) (2007); Utah Code Ann. § 20A-1-102(76)(a)(vii), (b)(xii), (b)(xiii) (2007); Wash. Rev. Code § 29A.44.205 (2007); *see* Arizona Secretary of State Jan Brewer, Proof of Identification at the Polls, http://www.azsos.gov/election/Prop_200/poll_identification.htm (last visited Nov. 11, 2007) (specifying that Arizona will accept tribal IDs, pursuant to Ariz. Rev. Stat. Ann. § 16-579 (2006)).

34 As to Missouri, see *supra* note 8.

35 *See* Ala. Code § 17-9-30(a), (b), (e) (2007); Alaska Stat. §15.15.225 (2007); Ark. Code Ann. § 7-5-305 (2007); Cal. Code Regs. tit. 2 § 20107 (2006); Colo. Rev. Stat. § 1-7-110

Last year, Minnesota adopted a general rule of statutory interpretation that "If a Minnesota identification card is deemed an acceptable form of identification in Minnesota Statutes or Rules, a tribal identification card is also an acceptable form of

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(2007); Conn. Gen. Stat. Ann. § 9-261(a) (2007); Conn. Gen. Stat. Ann. § 9-23r(d) (2007); Del. Code Ann. tit. 15 § 4937 (2007); Del. Code Ann. tit. 15 § 7554 (2007); D.C. Code § 1-1001.07(i)(6) (2007); Fla. Stat. Ann. § 97.0535(3) (2007); Haw. Rev. Stat. § 11-136 (2007); Idaho Code Ann. § 34-410 (2007); 10 Ill. Comp. Stat. 5/17 10 (2007); Iowa Code § 48A.8 (2007); Kan. Stat. Ann. § 25-2908(d) (2006); Ky. Rev. Stat. Ann. §117.227 (2007); Ky. Rev. Stat. Ann. § 117.245 (2007); La. Rev. Stat. Ann. § 18:562 (2007); Me. Rev. Stat. Ann. tit. 21-A § 121 (2007); Me. Rev. Stat. Ann. tit. 21-A § 222 (2007); Md. Code Ann., Elect. Law § 10-312 (2007); Mass. Gen. Laws ch. 54, § 76B (2007); Mich. Comp. Laws § 168.523 (2007); Miss. Code Ann. § 23-15-169.2 (2007); Neb. Rev. Stat. § 32-914 (2006); Neb. Rev. Stat. § 32-927 (2006); Nev. Rev. Stat. § 293.2725 (2007); Nev. Rev. Stat. § 293.277 (2007); N.H. Rev. Stat. Ann. § 654:12 (2007); N.J. Stat. Ann. § 19:15-17 (2007); N.M. Stat. Ann. § 1-12-7.1(D) (2007); N.M. Stat. Ann. § 1-1-24 (2007); N.Y. Elect. Law § 8-302 (2007); N.C. Gen. Stat. § 163-166.12 (2007); Ohio Rev. Code Ann. § 3505.18(A)(1) (2007); Okla. Stat. tit. 26, § 7-115.2 (2007); Or. Rev. Stat. § 247.973 (2005); 25 Pa. Stat. Ann. 25, § 3050 (2007); R.I. Gen. Laws § 17-19-24.1 (2007), R.I. Gen. Laws § 17-15-26 (2007); S.C. Code Ann. § 7-13-710 (2006); Tenn. Code Ann. § 2-7-112 (2007); Tex. Elec. Code Ann. § 63.001 (2007), Tex. Elec. Code Ann. § 63.008 (2007), Tex. Elec. Code Ann. § 63.0101 (2007); Vt. Stat. Ann. tit. 17, § 2563 (2007); Va. Code Ann. § 24.2-643(B), (E) (2007); W. Va. Code § 3-2-10 (2007); Wis. Stat. § 6.34(2) (2007), Wis. Stat. § 6.34(3) (2007); Wyo. Stat. Ann § 22-3-118 (2007); *see also*, Ariz. Rev. Stat. Ann. § 16-579 (2007) (discussed *supra* note 33).

identification."[36] Maine and Wyoming have similar statutes.[37]

In Chicago, tribal members can pass through security at O'Hare International Airport or enter the Dirksen Federal Building to observe oral arguments before the Seventh Circuit Court of Appeals using their tribal ID cards.[38]

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36 Minn. Stat. Ann. § 171.072 (2006). The Friday before the 2004 Presidential Election, the District of Minnesota granted a temporary restraining order requiring Minnesota to accept the tribal IDs of Indians living off reservations. *ACLU of Minnesota, v. Kiffmeyer*, No. 04-CV-4653, 2004 WL 2428690 (D. Minn. Oct. 28, 2004). The Minnesota Secretary of State had issued a memorandum shortly before the election instructing officials that they were only to accept tribal IDs from tribal members who actually resided on a reservation. In addition to the ACLU and *Amicus* NCAI, plaintiffs in *Kiffmeyer* included Bonnie Dorr-Charwood, an enrolled member of the Mille Lacs Band of Ojibwe, and Richard Smith and Tracy Martineau, enrolled members of the Fond du Lac Band of Lake Superior Chippewa, all three of whom had no form of photo ID other than their tribal ID cards.

37 *See* Me. Rev. Stat. Ann. tit. 29-A § 1410 (2007); Wyo. Stat. Ann § 8-7-101 (2007).

38 Telephone interview with Dirksen Federal Building Security Services (Nov. 9, 2007); *see* Transportation Security Administration, The Screening Experience: What Do You Need, http://www.tsa.gov/travelers/airtravel/screening/index.shtm (last visited Nov. 9, 2007) (encouraging adult travelers to bring with them any "government-issued photo ID" and warning travelers only that the "absence of proper identification will result in additional screening").

In short, about the only thing tribal members cannot do with their tribal ID cards that they could do with a state or federal ID is vote in Indiana. Indiana's failure to extend comity and accept tribal ID cards at the polls undermines the sovereign status of American Indian and Alaska Native tribal governments and unreasonably burdens the right to vote.

IV. STATE AND LOCAL LEGISLATURES HISTORICALLY HAVE RELIED ON TIME, PLACE, AND MANNER VOTING REGULATIONS LIKE VOTER ID REQUIREMENTS TO PREVENT AMERICAN INDIANS AND ALASKA NATIVES FROM VOTING.

American Indians and Alaska Natives realize that the best way to protect their rights is through active participation in the political system. There are approximately 1.9 million people who are enrolled members of one of the 562 federally recognized Indian tribes.[39] In 2004, American Indians voted in record numbers and their participation was credited as outcome determinative in several races.[40] Historically, however, American Indians and Alaska Natives have been forced to resort to the courts to protect their ability to

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39 2003 BIA LABOR REPORT, *supra* note 20, at ii..

40 *See, e.g.*, Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 177-183 (2007); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 270-271 & n.7 (2004) (quoting Michael Barone, Grant Ujifusa & Douglas Matthews, THE ALMANAC OF AMERICAN POLITICS 1468 (2004)).

participate in local, state, and federal elections from burdensome time, place, and manner voting regulations intended to disenfranchise them.

Indian people were not made citizens of the United States until 1924. Even after passage of the Indian Citizenship Act, it took nearly 40 years for all 50 states to recognize that American Indians have the right to vote. For years, a number of states denied American Indians the right to vote because they were "under guardianship." In other places, American Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties. New Mexico was the last state to remove all express legal impediments prohibiting American Indians from voting in 1962, three years before the passage of the VRA in 1965. Although the American Indian right to vote in Arizona was recognized in 1948, it was limited to those who could pass the state literacy test, and therefore many American Indians could not vote in state and federal elections until after 1970.

Since the passage of the VRA, at least 73 cases have been brought under the Act or the Fourteenth or Fifteenth Amendment in which Indian interests were at stake.[41] The discrimination trends that emerge from these cases closely track the experience of African Americans, with discrimination shifting from *de jure* to *de facto* as the cases become more

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[41] Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 45 (2007).

recent. Recent cases focus on the discriminatory application of voting rules with respect to registration, polling locations, and voter identification.[42]

Native people continue to face ongoing struggles when trying to exercise their right to vote today, including overt hostility to Native voting. For example, in 2002 a South Dakota State legislator stated on the floor of the Senate that he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty."[43]

"The most recent source of conflict to emerge is voter identification requirements."[44] Cases now pending in the lower courts squarely challenge voter identification statutes as applied to American Indians.[45] The district judge in *Amici* Navajo Nation

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42 *Id.* at 46; *see id.* at 48–68 (collecting cases).

43 *Boneshirt v. Hazeltine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Rep. John Teupel).

44 *McCool et al., supra*, note 41, at 73; *see e.g., Purcell v. Gonzales*, 127 S. Ct. 5 (2006); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 286 (2004); Adam Cohen, *Editorial Observer; Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. TIMES, June 21, 2004, www.nytimes.com.

45 *E.g., Inter Tribal Council of Arizona, et al. v. Jan Brewer*, 06-1362 (D. Ariz.); *Navajo Nation, et al. v. Jan Brewer*, 06-1575 (D. Ariz.). These cases have been consolidated with *Gonzales v. Arizona*, 06-1268 (D. Ariz.). Requiring non-English proficient American Indian voters to provide ID at the polls creates an additional burden for American Indian language speakers because they have less opportunity to

and Agnes Laughter's case will be scrutinizing this Court's forthcoming opinion for guidance in these cases.

V. This Case Should Be Resolved with a Ruling in Petitioners' Favor on the Present Facial Challenge.

Amici recognize that the instant case does not directly present to the Court the particular disparate impact—and, indeed, discriminatory intent—challenges that would be brought by Native Americans and that would require the invalidation of statutes such as Indiana's as applied to them. But the Court should be aware that its endorsement of the Indiana statute—even if only on a facial basis—likely would lead to the disenfranchisement of substantial numbers of American Indian voters until their "as applied" challenges could be heard and finally adjudicated.

As noted above, Missouri has already passed a similar voter ID law.[46] Additional states,

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avoid the ID requirement by voting early, voting absentee, or voting by mail. In Arizona, for example, individuals are encouraged to vote by mail or vote early to avoid the ID requirement, an option that is not available to most American Indian language speakers who utilize translators at the polls. Most Native Americans in Arizona vote at the polls, while in Maricopa County—the most populated county in Arizona—approximately 50% of electors vote early. This disparity places a severe burden on the right of voters who have no choice but to vote at polls.

46 *But see supra* note 8 (explaining that the Missouri Supreme Court found that the statute violated the Missouri constitution).

particularly those where tribes are located, would be encouraged to pass similarly restrictive voter ID statutes that require a photo ID card issued by either a state or the federal government. In 2007 alone, at least ten state legislatures have introduced voter ID bills that, like the Indiana statute, would require voters to present a photo ID issued by either a state or the federal government.[47]

Opponents of tribal voting rights currently can give no reason why states should not recognize the severe burden that photo ID requirements place on Native Americans. This Court should be careful not to create such a reason. Accordingly, and for the reasons set forth in Petitioners' briefs, Amici agree with Petitioners that the Court should find the Indiana statute on its face to violate the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[47] Alabama: H.B. 381, 2007 Reg. Sess. (Al. 2007); Arkansas: H.B. 2120, 86th Leg. (Ark. 2007); California: S.B. 173, 2007-2008 Reg. Sess. (Cal. 2007); Hawaii: H.B. 1133, 24th Leg. (Haw. 2007); Maine: L.D. 1783, 123rd Leg. (Me. 2007); Missouri: S.B. 596, 94th Leg. (Mo. 2007); North Carolina: S.B. 779, 2007 Gen. Assem. Reg. Sess. (N.C. 2007); Oklahoma: S.B. 778, 51st Leg. (Okla. 2007); Oregon: S.B. 876, 74th Leg. (Or. 2007); Tennessee: H.B. 670, 105th Leg. (Tenn. 2007); *see also* H.B. 638, 185th Leg. (Mass. 2007) (would also accept Social Security card).

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AMICUS CURIAE BRIEF

No. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AND OTHER NATIONAL HOMELESSNESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The National Law Center on Homelessness & Poverty ("NLCHP") is a not-for-profit organization based in Washington, D.C., established to address issues related to homelessness and poverty at the national level. Poor and homeless people are frequently without effective political voice or power and any impediment to their ability to exercise their right to vote disproportionately affects them because the franchise is one of the few political mechanisms available to homeless individuals. NLCHP works with groups throughout the country to ensure that the constitutional and statutory rights of homeless families and individuals are protected and that laws are not selectively enforced against them.[1]

NLCHP advocates nationally to protect the constitutional rights of homeless individuals, including the fundamental right to vote. NLCHP has surveyed the photo identification requirements in every state, interviewed over 100 homeless service providers about the barriers that homeless people face when attempting to obtain such identification, and has published several related reports and manuals. NLCHP has extensive experience with federal constitutional questions affecting homeless people and believes the insights derived from its experience will assist this Court.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The National Alliance to End Homelessness (NAEH) is a non-profit organization working with the public, private and non-profit sectors to solve the problem of homelessness. NAEH's mission is to address the long-term solutions to homelessness. NAEH accomplishes this by working to inform national policy on homelessness and to increase the capacity of local organizations to deliver effective assistance. NAEH also supports efforts to ensure the constitutional rights, including voting rights, of homeless people are protected.

The National Coalition for the Homeless ("NCH") is a non-profit organization and membership network of local and statewide homeless coalitions committed to the goal of ending homelessness through systemic and attitudinal changes. NCH helped establish the National Homeless Civil Rights Organizing Project, which has published several reports on civil rights and voting rights of homeless persons.

The National Coalition for Homeless Veterans ("NCHV") is a non-profit founded in 1990 by a group of homeless veteran service providers. NCHV seeks to eliminate homelessness in the veteran community, by inviting individuals and all types of service providers to work in collaboration to develop innovative, comprehensive services that will allow homeless veterans to support themselves. NCHV shares the goal of protecting the voting rights of homeless people.

The National Health Care for the Homeless Council, Inc., is a membership organization comprised of 91 local service agencies, over 500 individual clinicians, and numerous homeless and formerly homeless persons. The National Council seeks to protect and promote voting rights of homeless persons.

The National Low Income Housing Coalition (NLIHC) is dedicated to ending America's affordable housing crisis. NLIHC focuses its advocacy on those with the most serious housing problems, the lowest income households. Further, a significant portion of NLIHC's work has included promoting voter participation among low-income and homeless individuals.

The National Policy and Advocacy Council on Homelessness ("NPACH") is a grassroots anti-poverty organization, whose mission is to ensure that national homelessness policy accurately reflects the needs and experiences of local communities. NPACH works to accomplish its mission through education, grassroots organizing, research, and technical assistance. NPACH supports efforts to protect homeless people's voting rights.

STATEMENT OF CASE

The Indiana law at issue significantly and unnecessarily burdens the voting rights of homeless persons. Obtaining a photo identification card under Indiana law requires documentation that is difficult, if not impossible, for many homeless individuals to provide. Most directly, in order to obtain the photo identification necessary to vote, the voter must present proof of a current address – which is impossible for unsheltered homeless people to provide. Ironically, an unsheltered homeless person may register to vote in Indiana without providing a specific street address; but, under this new law, a duly registered voter who lacks a current address could not obtain the photo identification card necessary to cast a regular ballot.

Instead, the Indiana law affords homeless persons who lack the requisite identification the sole option of

casting a provisional ballot, which is ignored unless the voter appears again at a different location to sign an attestation. The burdens created by this requirement to appear separately to sign a simple statement that could be executed at the polling place lack any connection to the State's putative interest in eliminating voter fraud. Although the record is devoid of any reason to believe that homeless persons are more likely than other voters to commit voting fraud, the Indiana provision burdens homeless voters with requirements that are particularly onerous for them.

A. The Status Of Homeless Persons Living In The United States

There are a significant number of people potentially affected by photo identification laws such as Indiana's. While it is difficult to determine with precision the number of homeless persons in the United States today, most estimates place the number of homeless people at between 500,000 and 750,000 persons. One large study estimated that the number of people who are homeless for some portion of the year can range from anywhere between 2.5 million and 3.5 million persons. See Office of Comty. Planning & Dev., U.S. Dep't of Hous. & Urban Dev., *The Annual Homeless Assessment Report to Congress* 7 (Feb. 2007) (hereinafter "*Annual Report*") (citing Martha R. Burt et al., *Helping America's Homeless: Emergency Shelters or Affordable Housing?* (2001)). Indeed, a 1990 study estimated that as many as 26 million people, 14 percent of the U.S. population in 1990, had experienced homelessness at some point in their lifetimes. *Id.* (citing B.G. Link et al., *Lifetime and Five-Year Prevalence of Homelessness in the United States* (1994)).

The homeless population is also demographically diverse. See *id.* at 21 (highlighting that the "data suggest that homelessness affects all genders, races, ethnicities, ages, and household types"). Thirty-four percent of homeless persons are in families with children. *Id.* at 29. Although estimates vary, perhaps as many as 44% of homeless persons have a full or part-time job. See Martha R. Burt et al., Interagency Council on the Homeless, *Homelessness: Programs and the People they Serve: Technical Report* 5-9 (Dec. 1999); *cf.* U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2006: A 23-City Survey* 48 (Dec. 2006) (hereinafter "*Status Report*"). Of the unaccompanied adults who are homeless, sixteen percent are women. *Annual Report*, at 29. Twenty-five percent of the sheltered homeless population are youth under the age of 17. See *id.* at iv. And, while all groups are affected by homelessness, minorities are disproportionately afflicted, comprising about 59% of the homeless population. See *id.* at 30. African Americans in particular experience homelessness in higher numbers than any other ethnic group, comprising approximately 45% of the homeless population. See *id.*

The living circumstances of homeless people also vary. Some are able to access emergency shelters, but the HUD Annual Report reviewed data from January 2005 and concluded that 45% of the national homeless population was *unsheltered*. *Id.* at 23. In Indiana, one recent report estimates that there are almost 10,000 homeless persons, approximately 3,000 of whom are unsheltered. *See* Nat'l Alliance to End Homelessness, *Homelessness Counts* 14 tbl.2 (Jan. 2007) (hereinafter "*Homelessness Counts*").

Consistent with these data, Congress has described homelessness as "an immediate and unprecedented crisis due to the lack of shelter for a growing number of individuals and families." See McKinney-Vento Homelessness Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987). Under the Act, "homeless persons" are defined as "individual[s] who lack[] a fixed, regular, and adequate nighttime residence" and whose "primary nighttime residence . . . is . . . a supervised publicly or privately operated shelter designed to provide temporary living accommodations" or "a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings." 42 U.S.C. § 11302(a). Despite the important aid provided by this Act, many homeless people still do not receive even the most basic aid necessary to their survival. Indeed, the House of Representatives recently formally recognized the unabated national urgency to alleviate homelessness. See H.R. Res. 561, 110th Cong., 153 Cong. Rec. H8220 (2007) (enacted).

The causes of homelessness are complex, but the vast majority of homeless persons are living in public places involuntarily. Indeed, the most widely-accepted cause of homelessness is the lack of affordable housing, although several other factors frequently contribute to the circumstances that force people into homelessness. These include, in order of frequency, mental illness, substance abuse and lack of needed services, low paying jobs, domestic violence, prisoner reentry, unemployment, and poverty. U.S. Conference of Mayors, *Status Report*, at 4.

While these causes are complex, the impact of homelessness on the political life of these individuals is clear. Homeless persons have extremely limited access to the conventional mechanisms used to

persuade policymakers and interest groups. They have no party, no convention, no advertising, and no resources to organize and pressure their representatives for change. Accordingly, burdens on their franchise undermine one of the few opportunities they have to exercise some political influence.

B. Indiana's Statutory Requirements.

Under Indiana Code § 3-5-2-40.5 (the "Indiana voter identification law"), a person seeking to cast a vote in person is required to present valid photo identification issued by Indiana or the United States.[2] A person who fails to present a valid photo identification at the polling place may execute a provisional ballot. Ind. Code § 3-11-8-25.1(d). A provisional ballot, however, will not be counted unless the person who executed it appears before the Clerk of the Circuit Court or County Election Board within ten days of the election. *Indiana Democratic Party* v. *Rokita*, 458 F. Supp. 2d 775, 786 (S.D. Ind. 2006). At that time, the person must either (i) present valid photo identification and execute an affidavit that the person is the same person who previously cast the provisional ballot, or (ii) execute an affidavit indicating that the voter who previously cast a provisional ballot is either "indigent and unable to obtain proof of identification without the payment of a fee" or has a religious objection to being photographed. Ind. Code § 3-11.7-5-2.5(c)(2).

Indiana purports to justify this requirement to appear at a second location and execute a separate

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[2] The sole exception to this photo identification requirement for in-person voters is if the person lives in a state licensed facility and votes in that facility. Individuals who vote by absentee ballot generally do not have to provide identification. *See* Ind. Code § 3-11-10-24.

affidavit as necessary to eliminate voter fraud. Indiana, however, has never prosecuted anyone for misrepresenting their identity at a polling place. *See Indiana Democratic Party*, 458 F. Supp. 2d at 792 (S.D. Ind. 2006).

Like Indiana, six other states – Georgia, Florida, Hawaii, Louisiana, South Dakota, and Michigan (as of November 7, 2007) – all require in-person voters to present some form of photo identification. See Ga. Code Ann. § 21-2-417; Fla. Stat. § 101.043; Haw. Rev. Stat. § 11-136; La. Rev. Stat. Ann. § 18:562(A)(2); S.D. Codified Laws § 12-18-6.1; Mich. Comp. Laws § 168.523. Georgia and Florida, along with Indiana, also provide no method by which a person can cast a regular ballot without photo identification.[3] The remaining states all include some means – such as signing an affidavit at the polling place – that would allow a person without photo identification to cast a regular ballot.

C. Indiana's Photo Identification Requirements Create Barriers To Voting For Homeless Persons

Under Indiana law, many homeless persons face insurmountable obstacles to obtaining some form of valid photo identification. Although Indiana does not require a fee for its state voter identification card, Ind. Code § 9-24-16-10, an applicant must obtain a number of documents to obtain this "free" identification card. Specifically, an applicant must provide the Indiana Bureau of Motor Vehicles ("BMV") with a primary document, a secondary

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[3] A provisional ballot cast by a voter without identification in Florida will be counted if the county canvassing board determines the signature on the ballot matches the voter's registration form. Fla. Stat. § 101.048(2)(b).

document, and one proof of Indiana residency, or two primary documents and one proof of Indiana residency. 140 Ind. Admin. Code 7-4-3. These regulations present two independent barriers to voter participation by homeless individuals. First, the proof-of-residency requirement is one that many homeless persons cannot satisfy under even the most charitable interpretation of the regulations. Second, the documentation requirement is particularly financially and administratively burdensome to homeless persons who are the least able to bear it.

1. First and foremost, a person seeking an Indiana photo identification is always required to produce proof of residency. See *id.* Although Indiana authorities will accept a range of documents, such as a current utility bill, whatever document is used to satisfy the residency requirement must contain the applicant's name and current address. See *id.*[4] By definition, homeless persons, although part of particular communities, typically will not have the requisite traditional address.

This provision thus effectively requires that voters live in a traditional dwelling in order to obtain voter identification. While it theoretically may be possible for some homeless persons to use an Indiana shelter as their address,[5] in practice, shelter stay limitations make it very difficult for a person to use any given shelter as an address. Across the country, almost 75

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[4] P.O. boxes may not be used as proof of residency. *See* 140 Ind. Admin. Code 7-4-3.

[5] Homeless persons may be able to use a letter from a shelter as proof of residency and the shelter address as their address, although this option is not listed among the accepted documents in the State's regulations. *See* Indiana BMV, Driver Licenses: Frequently Asked Questions, *at* http://www.in.gov/bmv/driverlicensefaq.htm (last viewed Nov. 7, 2007).

percent of "sheltered" homeless individuals rely on "emergency" shelters, which are intended to provide only short-term housing programs. *Annual Report*, at 46-47. Consequently, the length of stay is normally short; data evaluated by HUD in its Annual Report reflect that the median stay is only 31 days. See *id.* at 48 ex.5-4. And only about a quarter of sheltered homeless individuals stay more than 60 days at an emergency shelter. See *id.* Accordingly, even if a homeless person could use an emergency shelter as his current address, brief stays make it impractical for homeless persons to use any particular shelter's address for proof-of-residency.[6]

But many homeless people are not affiliated with shelters, and approximately 30 percent of homeless Indiana residents are unsheltered.[7] Indiana, like most other states, lacks enough temporary shelter to meet the needs of all of the State's homeless individuals. More generally, a survey of 57 communities in the United States found that not one had enough shelter space to meet demand. See Nat'l Coal. for the Homeless & Nat'l Law Ctr. on Homelessness & Poverty, *Illegal to be Homeless: The Criminalization of Homelessness in the U.S.* 13 (2002); see also *Homelessness Counts*, at 14 tbl.2 (noting estimates that 45% of homeless persons nationwide lack shelter). This need for shelter is

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[6] Shelters also often will not allow their addresses to be used because of the burden it puts on them to receive and hold people's mail.

[7] *See Homelessness Counts*, at 14 tbl.2. The shelter system, at times, can be financially out of reach for homeless persons. For example, some shelters charge fees, usually between $3 and $10, a price that can be prohibitively expensive for those seeking accommodations. *See* Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale L. & Poly Rev. 1, 13 (1996).

desperate and getting worse. The 2006 report of the U.S. Conference of Mayors based on a 23-city survey estimated that requests for emergency shelter had increased by 9 percent since 2005, with 68 percent of cities reporting an increase. U.S. Conference of Mayors, *Status Report*, at 37. Any doubts as to the involuntary nature of homelessness are dispelled by the fact that, of the number of homeless people requesting emergency shelter in the surveyed cities, 23 percent of homeless people and 29 percent of homeless families were turned away. *Id.* at 59.

Individuals who are currently without shelter cannot meet the State's proof of residency requirements and, therefore, are completely barred from obtaining the requisite identification card and thus casting a valid vote under the Indiana law. Although Indiana's voter identification law contains an indigency exception, it contains no express provision that allows the exercise of the franchise by those who cannot meet the proof-of-residency or other documentation requirements in order to obtain the specified identification.

This voter *identification* requirement contrasts with Indiana's regime for voter *registration*. Under either the National Voter Registration Form or the Indiana Voter Registration Application, one is allowed to provide a map diagram in lieu of a residential street address. Instructions read simply "[i]f your residence has no address, street number or name . . . . please draw a map where your residence is located, include roads and landmarks." Indiana Election Comm'n, Indiana Voter Registration Application, State Form 50504 (R5/12-05). The voter photo identification requirements, however, lack a similar provision.

Consequently, Indiana's requirement that voters prove a "current address" to obtain identification imposes a substantial and unnecessary burden on both those homeless persons who are staying at emergency shelters as well as those who live their lives in public spaces. Those unsheltered individuals could identify a specific location within a political community to which they regularly return and to which they intend to remain for the present such that they could be deemed to have a residence. Indiana could craft an exception allowing such proof to suffice (as it does during voter registration), or provide a form affidavit for execution at the polling place (as do other states). Instead, the Indiana law contains no such provisions, and unnecessarily disenfranchises duly-registered individuals who lack a traditional dwelling or shelter.

2. Indiana's requirement that a photo identification applicant produce supporting documents such as other governmental photo identification, a birth certificate or United States passport imposes a substantial, independent burden on homeless persons. As the record below demonstrated, homeless persons are uniquely exposed to the financial and administrative burdens imposed by a voter photo identification requirement. See *Indiana Democratic Party*, 458 F. Supp. 2d. at 795 (discussing the burdens to obtaining photo identification for homeless people).

It is an obvious yet critical truth that persons without stable accommodations are uniquely ill-equipped to maintain possessions over an extended period of time as they are without a secure place in which to store them. These individuals must carry large amounts of personal property – including any identification documents they may possess. As such,

these items are daily exposed to loss or theft. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1555-56 (S.D. Fla. 1992) (documenting incidents of malicious destruction of the property of homeless persons). Nor can homeless persons avoid these problems by staying at a shelter because shelters often prohibit residents from leaving personal possessions at the shelter during the day. Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *A Report to Secretary on the Homeless and Emergency Shelters* 38 (1988).

Homeless persons faced with these difficult realities often are without the primary documents required by Indiana to obtain photo identification.[8] Thus, as a practical matter, a homeless individual will frequently need to obtain copies of one or more of the required primary documents to apply for the "free" Indiana photo identification.

Obtaining copies of the required primary documents, however, is financially and administratively daunting for a homeless person of limited means. Typically, an applicant must pay a fee in order to obtain the needed document. For example, obtaining a copy of an Indiana birth certificate costs approximately ten dollars.[9] Moreover, a person searching for a birth certificate also would potentially need substantial funds in order to travel to and from

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[8] The primary documents accepted by the State include a United States birth certificate, a United States passport, United States documents showing that the person is a citizen born abroad, a United States military, veterans or merchant marine card with a photograph, a United States veteran's universal access identification card with photograph, or an Indiana driver's license or learner/driver education permit. 140 Ind. Admin. Code 7-4-3.

[9] Costs can vary by County. *See* Indiana State Department of Health website, *at* http://www.in.gov/isdh/bdcertifs/bdcert.html.

the place where the birth certificate is located, which may not even be in the same State as the person's current residence.

For homeless persons born in Indiana, the regulations can render it administratively *impossible* to obtain voter identification because, in some counties, a person is required to produce photo identification in order to obtain a birth certificate.[10] Under this "Catch-22" scenario, a person cannot get photo identification without a birth certificate, but cannot obtain a birth certificate without photo identification.[11]

D. The Provisional Ballot Burdens The Voting Rights Of Homeless People.

Without any valid photo identification, an individual attempting to cast an in-person vote may execute only a provisional ballot. Ind. Code § 3-11-8-25.1(d). The provisional ballot, however, imposes additional, unnecessary burdens upon homeless individuals. Under Indiana law, any person who executes a provisional ballot must return in person before either the Clerk of the Circuit Court or County Election Board within ten days of the election. See

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[10] *See, e.g.*, Tippecanoe County Health Dep't. Birth/Death Certificates (2007), *at* http://www.tippecanoe.in.gov/health/division.asp?fDD=15-42 ("To receive a copy of a certified birth certificate you must have your ID such as driver's license or State ID.").

[11] Gathering such documents is also particularly burdensome because it can entail going to multiple locations to obtain multiple forms of documentation. Accounting for the circumstances homeless persons must often navigate – e.g., traveling with all of one's possessions without access to a personal vehicle while often struggling for food and shelter – what would be merely an annoyance for others becomes an all but insurmountable obstacle for those without means or a fixed residence.

Ind. Code § 3-11.7-5-2.5; *Indiana Democratic Party*, 458 F. Supp. 2d at 786.

Any specific rationale for forcing the person to appear at a different location at a later time, and its connection to the suppression of voter fraud, is not present in the record. What is clear is that the requirement that homeless persons without photo identification return to a separate location at a separate time and date imposes gratuitous burdens of travel, time and expense on those persons least likely to be able to bear them.

Assuming that a homeless person can manage to arrive at the appointed office, the individual must then either present a valid photo identification – the absence of which likely constitutes the reason the person was unable to vote a regular ballot in the first instance – or attest that he or she is "indigent and unable to obtain proof of identification without the payment of a fee." Ind. Code § 3-11.7-5-2.5(c)(2). Again, nothing in the record makes clear any reason that this attestation could not take place at the polling place.

This "indigency exception," moreover, requires what is literally a false attestation. Given that Indiana photo identification cards are *free*, it is unclear that a person without photo identification in Indiana could ever attest that he is "unable to obtain proof of identification without the payment of a fee." To be sure, gathering the needed supporting documents certainly will impose significant costs on homeless individuals, but there is no indication in the record that the State will consider this fact to constitute a "payment of a fee" under the Act. *Id.* The Indiana law is thus crucially and impermissibly vague regarding whether this exemption for indigent persons could ever be fulfilled (unless the Court is

willing to indulge the assumption that the State will effectively soften the literal wording of the statute through regulation). Consequently, under the Indiana law, a homeless person without the means to obtain photo identification might never be able to convert a provisional ballot into a regular ballot.

SUMMARY OF ARGUMENT

As James Madison made clear long ago, the franchise was intended to extend "[n]ot [to] the rich more than poor" because "[t]he electors are to be the great body of the people of the United States." *The Federalist No. 57* (J. Madison) (defending the House of Representatives). The Constitution recognizes state legislative power to control the "Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. But this Court also has long recognized that, under our Constitution, "the political franchise of voting [is] a fundamental political right[] because [it is] preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966). Accordingly, this Court reviews for rationality regulations over the voting process that are "reasonable [and] non-discriminatory," but applies more searching scrutiny to those regulations that unreasonably restrict access to the ballot. *Anderson* v. *Celebrezze*, 406 U.S. 780, 788 (1983).

The Indiana photo identification law unreasonably and unnecessarily harms homeless individuals. Although one may register to vote without a street address, the Indiana identification law effectively mandates that only persons who can provide the specified proof of current address and other documentation required for government-issued identification may cast a regular ballot. Many homeless persons cannot provide the specified proof

of current address. Nor can many homeless persons afford the further documentation Indiana requires to obtain "free" photo identification. The court of appeals erred by ignoring these significant and inevitable practical burdens imposed by the Indiana voter identification law.

The "indigency exception" in the Indiana law does not remotely cure these defects. No persuasive reason supports requiring a person to travel to another location for the sole purpose of declaring his poverty. And such a declaration of an inability to afford the Indiana photo identification card – while arguably false given that the cards themselves are "free" – fails to address the inability to obtain valid photo identification because homeless persons lack a current address or other necessary documentation.

Through these requirements, Indiana imposes a substantial and unnecessary burden on the fundamental right to vote and effectively disenfranchises an entire group of eligible voters. These requirements are unreasonably burdensome and weigh heavily upon homeless persons, requiring this Court to engage in a searching review of its purported rationality. See *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992).

Indiana's interest in preventing voter fraud is not served by forcing homeless people to travel to a different location to sign a literally false attestation. Indeed, the record is devoid of any evidence that accommodating the burdens on homeless people would inhibit the State's desire to combat perceived voter fraud. Likewise, the underlying requirement for the photo identification – that one have proof of a current address – imposes on some significant number of homeless individuals an insuperable

barrier to their right to cast a vote that will be counted.

Under the appropriately searching analysis, the State's proffered interest in maintaining a statute that severely affects a population's fundamental interest must be examined in the specific context of those affected groups so that the Court is "scrutiniz[ing] the asserted harm of granting specific exemptions." See *Gonzales* v. *O Centro Espirita*, 546 U.S. 418, 431 (2006); see also *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003). There is no permissible reason to deny homeless persons practical accommodations such as signing an affidavit at the polling site – a requirement which could protect both the franchise of homeless persons and the integrity of the ballot.

Indiana's effort to tie the franchise to the possession of photo identification senselessly increases the burdens of homelessness and denies homeless people their full measure of political expression in our political community. This Court has repeatedly held that ballot access may not be dependent on voter affluence, see, *e.g.*, *Harper*, 383 U.S. at 668, and lower courts have recognized that homeless people should not face additional hurdles to vote solely because they are impoverished and live in unconventional places. *Collier* v. *Menzel*, 176 Cal. App. 3d 24 (1985); *Pitts* v. *Black*, 608 F. Supp. 696 (S.D.N.Y. 1984).

The perspective of homeless people during the electoral process is especially significant given that the justice of a law is best measured by its impact on those least able to speak for themselves in the normal political processes. The Constitution has always "forbid[den] 'sophisticated as well as simple-minded modes of discrimination.'" *Reynolds* v. *Sims*, 377 U.S.

533, 563 (1964). Whether intentionally or thoughtlessly, the Indiana law needlessly diminishes the ability of homeless people to exercise their franchise and is therefore invalid.

ARGUMENT

THE INDIANA LAW UNREASONABLY AND UNNECESSARILY BURDENS THE RIGHT OF HOMELESS PERSONS TO VOTE.

A. Severe Restrictions On The Franchise Merit Particularly Searching Review.

"In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); see also *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized.").

In recognition of the fundamental role that voting plays in our Republic, only "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls" are permissible. *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1992) (allowing a prohibition on write-in candidates in light of an open filing scheme for ballot access); see also *Anderson* v. *Celebrezze*, 460 U.S. 780, 806 (1983) (striking down unreasonable filing deadlines for independent candidates). This Court's decisions in *Anderson* and *Burdick* acknowledge the State's power

to choose its own reasonable management methods while also guarding the fundamental right to vote.

State election laws that severely burden the right to participate in elections have thus consistently been held to merit the most searching judicial review. See, *e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005) ("[S]trict scrutiny is appropriate . . . if the burden is severe."); *Norman* v. *Reed*, 502 U.S. 279, 289 (1992) ("[W]e have . . . required any severe restriction to be narrowly drawn to advance a state interest of compelling importance."); *Cipriano* v. *City of Houma*, 395 U.S. 701, 704 (1969) (per curiam). In assessing the proper level of scrutiny, this Court weighs

> "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 780); see also *id.* at 445-46 (Kennedy, J., dissenting) (agreeing with this formulation).

This Court has thus applied a measured, elastic scrutiny which depends largely upon the gravity of the burden to the franchise. "[T]he rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which [the] challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Accordingly, if a law creates a "reasonable and non-discriminatory" regulation over the voting process, the law need only be justified by a rational basis. *Anderson*, 460 U.S. at 788. But if

ballot access regulations impose "severe restrictions" affecting the eligibility of citizens to participate in the election process, *Burdick* requires that those regulations must be "'narrowly drawn to advance a state interest of compelling importance.'" 504 U.S. at 434.

B. The Indiana Law Imposes Severe Burdens On Homeless Persons' Franchise.

The Indiana photo identification requirement erects severe barriers to voting for indigent persons generally and homeless persons in particular. Because these regulations effectively disenfranchise one class of voters, they are constitutionally invalid unless they are necessary to promote a compelling state interest. See *id.* As Circuit Judge Wood noted, "To the extent that [the Indiana law] operates to turn [eligible voters] away from the polls, it is just as insidious as the poll taxes and literacy tests that were repudiated long ago." *Crawford* v. *Marion County Election Bd.*, 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from the denial of rehearing en banc).[12]

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[12] This balance also reflects human rights norms given that voter registration laws that deny homeless voters the right to vote also violate the human rights standards with which the U.S. has agreed to abide under the International Covenant on Civil and Political Rights (ICCPR), as ratified on June 8, 1992. *See* U.S. Const. art. VI, cl. 2. Article 25 of the ICCPR specifically recognizes the right to vote without distinctions of status or "unreasonable restrictions". *International Covenant of Civil and Political Rights*, art. XXV, Mar. 23, 1976. The U.N. Human Rights Committee, which monitors implementation of the ICCPR, has specifically noted:

> States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be

The first and most significant barrier a homeless person faces when attempting to obtain photo identification is the requirement that the applicant provide proof of his current address. Ironically, such proof of current address is not a requirement to register to vote, but the new law creates this requirement in order actually to cast a regular ballot. Unless circumstances somehow allow a shelter or other address to be used, this requirement places a substantial and unnecessary burden on the franchise of homeless individuals. The photo identification requirement, as a practical matter, limits those eligible to cast a regular ballot to those individuals with a current address. Thereby, it deprives homeless individuals of one of the few activities that they still may do just like anyone else: vote.

In addition to the proof of current residential address requirement, a homeless person also is saddled with the burden of obtaining the identification itself, which includes the relatively significant costs of obtaining necessary supporting documents, such as a passport or birth certificate. And the administrative requirements for such documents may often prove to be insurmountable for a person of little or no means who lacks the photo identification that is often necessary to obtain the documents, such as birth certificates, which are in turn necessary to obtain the requisite photo identification. At bottom, the practical consequences of these financial and administrative hurdles on

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imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.

U.N. Human Rights Comm., *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25)*, CCPR/C/21/Rev.1/Add.7 ¶ 11 (Dec. 7, 1996).

homeless persons significantly burden their franchise.[13]

Indiana's law likewise denies a coherent alternative to those who have cast a provisional ballot but are unable to obtain photo identification. The provisional ballot option requires the voter to return to a separate office and thereby creates senseless financial and administrative costs that other members of the community can avoid. Consequently, a person unable to obtain identification would be exceptionally unlikely to be able to convert a provisional vote into a counted ballot.

C. The State Has No Compelling Interest In Burdening The Vote Of Homeless People.

Indiana's amorphous interest in preventing voter fraud cannot satisfy the specific inquiry mandated for substantial burdens to the fundamental right to vote.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell* v. *Gonzales*, 127 S. Ct. 5, 7 (2006) (per curiam). But the analysis of the burdens of a particular law cannot proceed at such a level of abstraction. Rather, a "compelling interest test is satisfied through application of the challenged law 'to the person.'" *Gonzales* v. *O Centro Espirita*, 546 U.S. 418, 430 (2006). Searching judicial inquiry requires the Court to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize

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[13] Robert Andrew Ford and Brenda Thompson, caseworkers at a day center for homeless persons in Indianapolis, provided specific testimony on the "severe" hardships this law will impose on homeless persons, particularly in obtaining and retaining documents and transportation. *See* J.A. 10-19.

the asserted harm of granting specific exemptions." *Id.* at 431. This context-specific inquiry must indeed be "sensitive to the facts of each particular claim." *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring in judgment); see also *O Centro Espirita*, 546 U.S. at 431-32 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003) & *Adarand Constructors, Inc.*, v. *Pena*, 515 U.S. 200, 228 (1995)).

In its putative effort to ensure the integrity of elections, Indiana has enacted a law that uses a hammer to attack a fly. There is no evidence that homeless individuals commit voting fraud and thus no reason exists to force them to leap through hoops to protect electoral integrity. Moreover, the State has made no apparent effort to document the scope or even the occurrence of the problem these laws were fashioned to prevent. Indeed, on this record, Indiana has conceded that it has never had occasion to prosecute a voter for using false identification. *Indiana Democratic Party* v. *Rokita*, 458 F. Supp. 2d. 775, 792 (S.D. Ind. 2006). Indiana has not claimed, much less offered any evidence, that imposition of a photo identification requirement on in-person voting would in any way curtail feared election fraud.

To the contrary, Indiana itself makes provisions for voters to register without a traditional residence, yet absurdly refuses similar accommodations in its identification requirements. Indeed, most states provide accommodations to homeless people that allow them both to register and cast regular ballots, without any evidence of endangering the integrity of their elections. See Nat'l Law Ctr. on Homelessness & Poverty, *Voter Registration and Voting: Ensuring the Voting Rights of Homeless Persons* A2-37 (2004). While it is true that homeless individuals are without

a traditional dwelling and are often impoverished, imposition of a photo identification requirement is invalid unless the State can show that the absence of such a requirement threatens its legitimate interests. Absent such an articulated interest, Indiana's photo identification requirement has no compelling reasons supporting it and is constitutionally suspect.

D. The Indiana Voting Law Is Not Tailored To Further The State's Purported Interest.

The irrationality of the burdens that the Indiana law imposes on homeless voters provides a particularly telling demonstration of the law's invalidity.

The Indiana Law is no mere economic regulation or simple registration requirement. Accordingly, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Anderson*, 460 U.S. at 806 (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963)). Indeed, lower courts have already directly struck down similar statutory requirements that voters have a traditional dwelling. See *Pitts* v. *Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); see also *Collier* v. *Menzel*, 176 Cal. App. 3d 24 (1985).

> A citizen who is a qualified voter is no more or less so because he or she lives in an unconventional place. . . . Denying the opportunity to vote to a resident merely because he or she cannot afford housing denies a citizen's vote on the basis of economic status and is therefore an impermissible basis for determining the entitlement to vote.

Collier, 176 Cal. App. 3d at 37.

Voter identification requirements potentially address only one, rare form of dishonesty: that of voter impersonation (which is a highly inefficient mode of influencing elections). Such laws have no effect on the integrity of electronic voting machines, dishonesty during vote tabulation, fraud during absentee voting, or voter intimidation and confusion.[14] These are the real sources of risks to the electoral process.

Even assuming this Court were to accept Indiana's provision as an incremental (if trivial) effort to curtail certain voter fraud, there is no rationality to be found in insisting on certain forms of photo identification at the time of voting as a means of addressing bureaucratic failures to maintain accurate rolls at the time of registration.[15] Restrictive voter identification laws are indeed a poor solution in search of a problem. Indiana law already contains a provision that can resolve actual doubts about a voter's identity without the new, onerous identification requirements challenged here.[16] No reasonable rationale supports

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[14] The Indiana law is also significantly under-inclusive in that it applies only to in-person voters but not individuals who vote by absentee ballot. By doing so, Indiana has left itself exposed to voter fraud activities by those voting through absentee ballot. There is little reason to believe that fraudulent activities – if they actually occur – are restricted to in-person voting.

[15] Respondents cite inflated voter registration rolls as the problem voter identification requirements are meant to address. J.A. 184, but Indiana does not require photo identification to register and requiring photo identification on the day of the election does nothing to clean the rolls.

[16] Ind. Code § 3-11-8-25.1(d) provides:

> In case of doubt concerning a voter's identity, the precinct election board shall compare the voter's signature with the signature on the affidavit of registration or any certified copy of the signature provided under IC 3-7-29. If the board determines that the voter's signature is authentic, the voter

Indiana's insistence on this further, restrictive identification scheme when the practical result will be effectively to disenfranchise nearly politically powerless citizens.

The Indiana law also offers no reasonable alternative avenue to access the ballot box for those who do not have photo identification. Indeed, the provisional ballot option offered by Indiana is just as cumbersome as the photo identification requirement. It is absurd to require a homeless person to cast a provisional ballot and then travel to a different location in order to attest that they lack photo identification. No rationality supports the requirement of this second trip to a different location, much less the justification for not providing the necessary affidavit at the election site.

Other methods to achieve the same goals are certainly feasible. For example, Virginia accommodates voters who do not have a current identification by allowing that "if a voter is entitled to vote except that he is unable to present one of the forms of identification listed above, he shall be allowed to vote after signing a statement, subject to felony penalties for false statements pursuant to §24.2-1016, that he is the named registered voter who he claims to be." Va. Code Ann. §24.2-643. A pad of form affidavits is all that is required.

Indiana has failed to explain why its restrictive policy is necessary in light of such obvious alternatives or how it has attempted to tailor its law narrowly towards its purported goal of preventing

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may then vote. If either poll clerk doubts the voter's identity following comparison of the signatures, the poll clerk shall challenge the voter in the manner prescribed by section 21 of this chapter.

election fraud. Indeed, the analysis of these effects must "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson*, 460 U.S. at 806 (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973)). In failing to ensure meaningful, alternative access to the ballot box for duly-registered but homeless voters, the Indiana law is shown not to be narrowly tailored toward its purported end and, consequently, should be invalidated.

* * * *

At the end of the day, affluence must remain a "capricious or irrelevant factor" to the franchise. *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). The Indiana law significantly harms the ability of the poorest of its citizens both to cast regular ballots and to have their provisional ballots counted, and it does so in the service of a state interest that can only generously be described as speculative. The injury to most homeless individuals' First and Fourteenth Amendment rights, however, is tangible and insurmountable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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No. 07-21

In the

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that registered voters seeking to cast their ballots in person produce a particular form of government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondents Marion County Election Board, *et al.*[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case, addressing the inequities of the disparate impact theory in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002), and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Amicus considers this case to be of special significance in that Petitioners argue, in part, that this Court should review their Equal Protection claim using a disparate impact analysis, an approach this Court has dismissed in several opinions, including in the

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, via the parties' letters of consent to the filing of all briefs amicus curiae in support of either party received by the Court and entered onto the case's docket on October 11, 2007, and October 17, 2007, respectively.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

voting context. As Amicus, PLF will focus on this narrow issue, demonstrating that a predominant disparate impact analysis is inapposite to this Court's Equal Protection jurisprudence and unsound as a matter of public policy.

SUMMARY OF ARGUMENT

Petitioners allege that the Indiana voter identification statute, IND. CODE § 3-11-8-25.1(b), violates the Fourteenth Amendment's guarantee of equal protection of the laws. Brief for Petitioners at 27. Specifically, Petitioners argue at length that because the statute disproportionately impacts certain groups of voters, including racial minorities, it infringes on these voters' Equal Protection rights. Brief for Petitioners at 39-45.[2] Petitioners ascribe no discriminatory intent to those framing the statute, claiming only that the statute results in a disparate impact on select groups.

In a line of opinions including *Washington v. Davis*, 426 U.S. 229, 242 (1976), this Court has held that showings of disparate impact alone are insufficient to prove violations of the Equal Protection Clause. Rather, a showing of discriminatory intent is necessary to sustain such a challenge to a state action. *Id.* In *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66-68 (1980), this Court applied this rule to the voting context, holding that facially neutral voting statutes will be struck down only when evidencing a discriminatory purpose; a disparate impact alone is not enough.

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[2] Whether this disparate impact is a statistical reality is far from certain, as addressed by the briefs of Respondents and supporting amici.

Furthermore, public policy considerations counsel against any expansion of stand-alone disparate impact analysis, without proof of discriminatory intent or purpose, into the Equal Protection realm. As this Court has recognized, relying solely on disparate impact in Equal Protection cases would cause havoc in legislatures, courts, and communities throughout the nation. *Lewis v. Casey*, 518 U.S. 343, 376-77 (1996). For these reasons, this Court should affirm the decision of the Seventh Circuit upholding the Indiana voter identification law.

ARGUMENT

I

TO VIOLATE EQUAL PROTECTION, STATE ACTIONS MUST INTENTIONALLY DISCRIMINATE, NOT MERELY RESULT IN DISPARATE IMPACT

A. The Constitution Requires Equal Laws, Not Equal Results

The theory of disparate impact saw its initial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that case, this Court held that an employer's requirement that job applicants must have completed high school and pass a general intelligence test unlawfully discriminated against blacks. 401 U.S. at 431-32. Because these requirements excluded a higher proportion of blacks than whites and were not demonstrably related to actual ability necessary for employment, the Court found that the employer had violated Title VII of the Civil Rights Act of 1964. *Id.* While the *Griggs* Court found disparate impact a valid inquiry with regard to Title VII, the opinion said

nothing of the theory's relation to the Equal Protection Clause of the Fourteenth Amendment.

Less than a year after *Griggs*, this Court did address disparate impact within the ambit of Equal Protection. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), a criminal defendant challenged his conviction, arguing that the procedures for selecting his grand jury were designed to exclude black and female jury members, thus violating his Equal Protection rights under the Fourteenth Amendment. *Id.* at 626. For this proposition, the defendant cited a wealth of statistical evidence showing that black and female citizens were underrepresented on grand juries in his parish jurisdiction. *Id.* at 627-28.

The *Alexander* Court overturned the conviction. *Id.* at 634. While this Court did consider the statistical disparities in reaching its decision, these numbers were not the dispositive factors; rather, the Court used them merely as evidence to conclude that the disparities were the result of discriminatory intent: "[W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral." *Id.* at 630. Thus, for Equal Protection purposes, disparate impact by itself was not sufficient to sustain a claim. It was the discriminatory purpose of the grand jury selection procedures that resulted in the constitutional violation.

In subsequent opinions, this Court has made it even more clear that disparate impact alone is not enough to find a state action unconstitutional. In *Washington v. Davis*, 426 U.S. 229, black applicants for a police training program sued under the Equal

Protection Clause, alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the application test on blacks as compared to whites. 426 U.S. at 233.

In *Washington v. Davis*, this Court held that the petitioners had failed to prove an equal protection violation, as the test-failure statistics spoke nothing to the intent of the test's administrators. *Id.* at 242. This Court declared that discriminatory intent is the critical element in an Equal Protection claim and that while disparate impact is not irrelevant to such a claim, it alone is not sufficient as proof of intentional discrimination. *Id.* As the Fifth Circuit has written in applying *Washington v. Davis*:

> The Constitution forbids only purposeful discrimination. The fourteenth amendment is violated only if a state decisionmaker selects or continues in a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

United States v. LULAC, 793 F.2d 636, 646 (5th Cir. 1986) (footnotes omitted).

The year after *Washington*, in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977), this Court reaffirmed its understanding of the relationship between disparate impact and the Equal Protection Clause. Nonprofit housing developers planned to develop a tract of land in a racially diverse neighborhood for low-income residents. When the Village refused to rezone the land for multifamily

housing, the developers sued under the Equal Protection Clause, alleging that the refusal was racially motivated. 429 U.S. at 258-59. This Court found that the developers failed to prove the key element of discriminatory intent, holding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 253.

This Court addressed the applicability of disparate impact in cases of alleged sex discrimination in *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an Equal Protection claim that the award of veterans' preference in employment had a disparate impact on women, because proportionally fewer women served in the armed forces. *Id.* at 259-60. The Court noted that the *Washington* and *Arlington Heights* decisions recognized that when a facially neutral law has a disparate impact upon groups that historically had suffered discrimination, an inquiry into a potentially unconstitutional purpose is warranted. *Id.* at 273. However, the Court reaffirmed that its decisions signaled no departure from the settled rule that the Fourteenth Amendment "guarantees equal laws, not equal results." *Id.* Citing its earlier opinions, the Court concluded that "even if a neutral law has disproportionately adverse effect upon a [ ] minority, it is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory purpose." *Id.* at 272.

This Court again emphasized this point more recently in *Lewis v. Casey*, 518 U.S. 343. In a case involving prisoners' rights of access to the courts, this Court noted that it had rejected long ago the disparate

impact theory of the Equal Protection Clause in *Washington v. Davis*:

> There we flatly rejected the idea that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law of official act does not violate the Constitution, solely because it has a . . . disproportionate impact.

518 U.S. at 375 (internal citations and quotation marks omitted). The *Lewis* Court read *Washington v. Davis* as "acknowledging the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* (internal citations, quotation marks, and parenthesis omitted).

As these opinions show, this Court has clearly and consistently ruled that an Equal Protection claim depends upon proof of a state action's discriminatory purpose or intent, and not merely its disparate impact. This same rule should govern the disposition of this case. Petitioners' Equal Protection claim relies exclusively on disparate impact arguments to show, putatively, that their constitutional rights have been violated. They make no allegation, let alone offer substantial proof, that a discriminatory purpose animated the enactment of Indiana's voter identification law. Petitioners argue explicitly that purposeful discrimination is not at issue. Brief for Petitioners at 52. Thus, their claim must fail.

B. This Court Has Rejected The Disparate Impact Theory of Equal Protection in Voting Cases

In *City of Mobile v. Bolden*, black voters in Mobile, Alabama, challenged the legality of the city's method for selecting its governing commission, arguing that the at-large electoral system violated the Equal Protection Clause of the Fourteenth Amendment. 446 U.S. at 65. The plaintiffs' claim relied primarily on the fact that few black commissioners had been elected under the system.

This Court, in a plurality opinion, rejected the voters' reasoning that this showing of disparate impact was sufficient to invalidate the at-large voting system as unconstitutional. *Id.* at 65-74.[3] In so doing, the Court wrote that such voting laws only "violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *Id.* at 66. For this proposition this Court cited the "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," *id.*, and that "[t]he Court explicitly indicated in *Washington v. Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination," *id.* at 67. Perhaps to eliminate any

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[3] In 1982, Congress amended the Voting Rights Act in response to portions of the Court's opinion in *Bolden*. 42 U.S.C. § 1973(a). This enactment did not impact this Court's holding with regard to the Equal Protection Clause of the Fourteenth Amendment, or its holding rejecting the voters' disparate impact Fifteenth Amendment claims, 446 U.S. at 62. In these realms, *Bolden* still controls.

remaining doubt about its rejection of disparate impact as the predominant theory in Equal Protection claims, and specifically those involving voting, this Court wrote in *Bolden* that

> [a]lthough dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial voter dilution, the fact is that such a view is not supported by any decision of this Court. More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination.

Id. at 67-68 (footnote and citations omitted). This Court should affirm its reasoning once again, and uphold the Indiana voter identification statute against Petitioners' disparate impact Equal Protection challenge.

II

PUBLIC POLICY CONCERNS COMPEL THE REJECTION OF DISPARATE IMPACT THEORY

A. This Court Has Recognized the Public Policy Concerns Inherent in the Use of Disparate Impact Analysis

In *Lewis v. Casey*, this Court recognized that the Court in *Washington v. Davis* rejected a predominant disparate impact theory to support an Equal Protection claim due in large part to the broad and adverse implications of a ruling to the contrary. The Court

noted: "Under a disparate-impact theory, . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down." 518 U.S. at 376. The Court went on to explain that

> we rejected in *Davis* the disparate-impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted). The dangers of such a rule "would give rise to an unending stream of constitutional challenges." *Hernandez v. United States*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring in the judgment).

Similar concerns animate nearly all of the Court's decisions declining to apply the disparate impact theory to Equal Protection claims, *see* Part I, *supra*, and in other contexts as well. As Roger Clegg wrote in his *Disparate Impact in the Private Sector: A Theory Gone Haywire*, Briefly, Dec. 2001, at 20-24, this Court has at various times rejected disparate impact as applied to Titles VI and VII of the Civil Rights Act, the Equal Pay Act, 42 U.S.C. § 1981, and Title IX of the

Education Amendments of 1972, to name a few such areas.

In the private employment context, this Court has expressed concern that the disparate impact theory could be extended to require the adoption of quotas. *Watson v. Forth Worth Bank and Trust*, 487 U.S. 977 (1988). This Court found that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." *Id.* at 992. This Court thus recognized that employers in the private sector (like state actors in the public setting) are likely to opt for whatever tactics are necessary to avoid crippling litigation or enforcement actions. As this Court noted, these actions almost surely include instituting quotas to "even out the numbers," in effect actually illegally discriminating against one racial group in order to avoid being accused of discriminating against another based only on disparate impact. *Id.* at 993.

Concerns over disparate impact are not unique to this Court, or even to those who would advocate a strict disparate purpose approach to discrimination cases. Professor Michael Selmi, writing recently in the UCLA Law Review, opposes an approach based entirely on proof of discriminatory purpose. *Was the Disparate Impact Theory a Mistake?*, 53 U.C.L.A. L. Rev. 701 (2006). Nonetheless, Professor Selmi is highly critical of the disparate impact theory, arguing that it has diverted the attention of the public and, more importantly, the courts away from actual instances of true discrimination. *Id.* at 767-68. Though Selmi is of the opinion that a focus on discriminatory motive and intent is "outdated," he writes that he hopes his "[a]rticle will lead to a ceasefire on proposals to extend

the disparate impact theory into other areas." *Id.* at 782.

B. The Disparate Impact Theory Harms the Public

The potential for chaos that has informed this Court's rejection of the disparate impact theory in Equal Protection cases unfortunately has been realized in other arenas, such as education, where the theory has been allowed to operate. The following case studies illuminate the risks inherent to the disparate impact theory. These situations counsel against the further application of disparate impact theory, and in fact recommend the invalidation of disparate impact throughout the entirety of this Court's jurisprudence.

1. *Cureton v. National Collegiate Athletic Association*

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association of four-year colleges and universities located throughout the United States. The members are divided for purposes of athletic competition into Divisions I, II, and III. During the 1986-87 school year, the NCAA's Division I membership implemented Proposition 48, which required high school graduates to have a 2.0 grade point average (GPA) in eleven academic core courses and a minimum score of 700 on the Scholastic Aptitude Test (SAT) (or 15 on the ACT) in order to participate in Division I athletics. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999).

Proposition 48 was modified by Proposition 16 in 1992, which increased the number of required core courses to thirteen and used a sliding scale eligibility index. Four black student athletes who failed to

achieve eligibility because they did not meet the minimum standardized test score sued the NCAA, claiming that the minimum test score requirement has an unjustified disparate impact on black students in violation of Title VI of the Civil Rights Act and implementing regulations. The United States District Court for the Eastern District of Pennsylvania agreed and granted the plaintiffs' motion for summary judgment. *Id.* at 715.

The Third Circuit reversed, but avoided a decision on the merits. Instead, the court found that the NCAA was not subject to Title VI as it was not itself (as distinct from its member colleges and universities) a recipient of federal funding. *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999). The court, however, expressed its concern as to the scope and impact of the disparate impact theory, echoing this Court's language from *Lewis* on the practical implications of an expansive disparate impact theory:

> In reaching our result, we also point out the following. Neither Congress nor the Departments of Health and Human Services or Education has considered, at least in a formal proceeding of which we are aware, what the consequences would be if the disparate impact regulations were expanded beyond their current program limitations. It might well be that such expanded regulations could subject all aspects of an institution of higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended.

Id. Judge McKee, concurring and dissenting, *id.* at 119, observed that although this dispute was framed by issues of race, the record below noted:

> Low-income student-athletes also have been impacted to a greater degree than other student-athletes by Proposition 16 standards. For example, in 1997, 18 percent of all student-athletes with a self-reported family income below $30,000 failed to qualify, whereas only 2.5 percent of student-athletes with a family income greater than $80,000 failed to qualify.

Based on this data, Judge McKee found that Proposition 16 had a disparate impact on poor student-athletes regardless of race. He concluded: "Thus, the dynamics of the disparate impact here are the dynamics of socio-economic status. These are issues of class; not race." 198 F.3d at 119 (McKee, J., dissenting). This is a distinction that has escaped the government officials and others who advocate an expansive application of the disparate impact theory.

In the scholastic context, the fixation on meeting race quotas while ignoring other issues such as socio-economic status has grave consequences. Using the district court's rationale from *Cureton*, the use of the SAT to award National Merit Scholarships would violate Title VI if the awards were not precisely racially proportionate. Indeed, the use of objective standards such as the SAT and GPAs to award any type of scholarship or recognition would violate Title VI if the results did not comport with the racial profile of the test takers. The concept of subordinating individual academic excellence (or even, as in *Cureton*, bare adequacy) to racial proportionality would have a

devastating effect on the motivation of high school students.

Taken to its logical conclusion, the use of any cutoff point, such as a requirement of a 2.0 GPA in order to graduate from high school, would have violated the *Cureton* district court's interpretation of Title VI if it had a disparate impact on minorities. The district court's remedy, focused only on equality of results, would simply lower the standards to the point that everyone would qualify. While this would negate disparate impact, it also would remove a significant incentive for students to apply themselves to their studies. There had been no showing in *Cureton* that the NCAA used the SAT cutoff score as a pretext for race discrimination, only that there was a disparity in results. In the absence of such a showing, it would have been a grave misapplication of the law to require precise numerical proportionality for eligibility based on test results and GPA. The necessary result of such dogmatism would be to destroy the incentive of students, particularly those coming from backgrounds of poverty, to study and prepare themselves for life after athletics.

2. *Association of Mexican-American Educators v. California*

In 1983, the California Legislature amended the state Education Code to prohibit the state commission on teacher credentialing from issuing a credential for teaching in the state public schools unless the applicant has demonstrated proficiency in basic reading, writing, and mathematics skills. The Legislature further authorized the state Superintendent of Public Instruction to adopt an appropriate test to measure proficiency in these basic

skills. Pursuant to that mandate, the Superintendent adopted the California Basic Education Skills Test (CBEST). CBEST is a pass/fail examination comprised of three sections: reading, writing, and mathematics. The reading and mathematics sections each contain fifty multiple choice questions, forty of which are scored. The writing section consists of two essays. Since the inception of CBEST, minority applicants have disproportionately received failing scores. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 577-78 (9th Cir. 2000).

A class action was brought under Titles VI and VII on behalf of racial minorities who have been, are being, or will be adversely affected by failing CBEST scores that have kept them from obtaining teaching credentials. *Id.* Although based on the technical allegations that CBEST had not been properly validated, *id.* at 584, and that the cut-off score was too high, *id.* at 589, the basic thrust of the lawsuit was that the test was too hard. The Ninth Circuit, sitting en banc, found that Title VII applied, *id.* at 584, and affirmed the trial court ruling that "the passing scores on the CBEST reflect reasonable judgments about the minimum level of basic skills competence that should be required of teachers." *Id.* at 590.

The court could have cited, but did not, Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which provides that it is lawful for an employer to act upon the results of any professionally developed ability test provided that such a test is not designed, intended, or used to discriminate on the basis of factors such as race or national origin. CBEST was developed with the assistance of the Educational Testing Service, an organization "well known and respected as a developer

of standardized tests." 231 F.3d at 588. Further, there was no suggestion that CBEST was intended to discriminate on the basis of race. The state was therefore able to avoid the embarrassment of being forced to license teachers who were themselves woefully deficient in education. However, the state did not get off unscathed. The court refused to award the state its more than $216,000 of court costs (none of which were attorneys' fees) after years of litigation. *Id.* at 591-93. Thus, even though the state ultimately prevailed, it cost both time and taxpayers' money to fight the plaintiffs' improper use of the disparate impact theory.

3. *African American Legal Defense Fund v. New York State Department of Education*

Another example of the use of the disparate impact theory for counterproductive purposes is *African American Legal Defense Fund, Inc. v. New York State Dep't of Educ.*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998). This lawsuit, brought under the implementing regulations for Title VI, claimed that the State of New York's statutory policy of funding public schools based on attendance numbers had a disparate impact on minority students because of their lower attendance rates. Since minority students were absent more frequently than non-minorities, schools with large minority populations received proportionately less state funding than schools with smaller ratios of minorities. The plaintiffs suggested that state funding be based instead on student enrollment without regard to actual attendance. *Id.* at 338. The district court, however, found that

> with respect to plaintiffs' claim that the attendance-based system of distribution has a disparate impact on minorities because of such factors as single parenting, poor housing, and medical problems, which contribute to absenteeism among inner-city students, . . . one cannot look to Title VI's regulations for remedy for any alleged disparate impact of this nature, however real and distressing. . . . [C]learly it is not [the schools'] practices that have produced the absenteeism. Accordingly, Title VI's regulations support no action at law upon those factors.

Id. at 338-39.

The court thereupon dismissed the claim. *Id.* at 339. The alternative would have been to remove the incentive for schools to discourage absenteeism on the part of minority students, a policy with disastrous import for the education of those students.

These cases highlight the negative impacts of the disparate impact theory. In the name of avoiding discrimination, plaintiffs in these cases sought to impose policies that would have had significantly detrimental impacts on society in general, and on racial minorities in particular. They are symptomatic of the inherent problems of the disparate impact theory, and are evidence that this Court should reject its application not just in this case, but in all cases where the plaintiff is relying on the disparate impact theory to support an Equal Protection claim.

CONCLUSION

For the reasons stated above, the decision of the Seventh Circuit should be affirmed.

DATED: December, 2007.

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AMICUS CURIAE BRIEF

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Nos. 07-21 and 07-25

IN THE

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WILLIAM CRAWFORD, *et al.*, *Petitioners,*
v.
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INDIANA DEMOCRATIC PARTY, *et al.*, *Petitioners,*
v.
TODD ROKITA, *et al.*, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that represents the National Republican Party and actively and extensively participates in campaigns and elections in all 50 states, including Indiana.[1] The RNC is dedicated to growing support for the Republican Party's ideas, and expanding the number of voters who support Republican candidates. The RNC has a direct interest in ensuring that all eligible citizens enjoy equal access to the ballot box, that all elections are conducted in a fair and honest manner, and that public confidence in election results is not undermined by vote fraud or the perception of fraud.

SUMMARY OF ARGUMENT

1. Requiring photo identification at the polling place is not a Republican scheme to drive down voter turnout. Empirical evidence demonstrates that photo identification (1) enjoys widespread, *bi-partisan*, public support, (2) does not adversely impact, and indeed may increase, minority voter

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[1] The parties have filed letters consenting to the filing of any *amicus* curiae brief with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

turnout, and (3) has worked smoothly in practice. Moreover, the Republican Party benefits by bringing more voters into the process and expanding the Party's base. In just the last two election cycles alone, the RNC has invested millions of dollars, and tremendous time and effort, in voter outreach and voter registration programs.

2. Vote fraud happens. Undeniably, the existence of vote fraud undermines the credibility of the electoral system and is sufficient grounds for Indiana to act. Moreover, the perception of vote fraud exists and is itself dangerous, eroding voter confidence and creating uncertainty over close election results. Indiana's photo identification law is a common sense administrative measure taken by the state to fight vote fraud and the perception of vote fraud.

ARGUMENT

I. PHOTO IDENTIFICATION IS A LEGITIMATE ADMINISTRATIVE STEP TO FIGHT VOTE FRAUD AND THE PERCEPTION OF VOTE FRAUD, NOT A REPUBLICAN MEASURE TO REDUCE VOTER TURNOUT.

Opponents of Indiana's photo identification law, Ind. S. Enrolled Act No. 483, Pub. L. No. 109-2005, argue that it is a Republican plot to drive down voter turnout, particularly among minority, elderly, and indigent voters. *See* Br. of Pet. Ind. Democratic Party, at 24. Petitioners further assert that Indiana's interest in protecting against vote fraud is simply a "Republican pretext" for suppressing Democratic Party voter turnout.[2] *See*

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[2] Petitioners are not alone in baselessly asserting that Indiana's photo identification law is actually a malicious Republican voter suppression plot. *Amicus* ACORN – an organization whose employees have been *indicted for voter registration fraud* – boldly states "increasingly, reports of voter fraud have been used to generate support for restrictive voting laws which suppress voting by those groups expected to oppose incumbent candidates and parties." Br. of *Amicus Curiae* Ass'n of Cmty. Orgs. For Reform Now (ACORN), at 7-8; *see also* Keith Ervin, *Seven Charged in Vote Fraud Scheme*, The Seattle Times, July 27, 2007, at B1. Indeed, even a dissenting Circuit Judge has alleged this against the Republican Party. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007)(Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

id. at 24, 39. The facts, however, contradict this partisan conspiracy theory. Indiana's statute is simply a legitimate effort by the state to protect the election process from fraud and the perception thereof.

A. Photo Identification Requirements Are Widely Supported And Have Been Shown To Increase Voter Turnout.

Empirical evidence shows that photo identification enjoys widespread bi-partisan support, and actually may *increase* minority voter turnout. The American public overwhelmingly favors voter identification requirements. In a survey of some 36,000 voters, professors at MIT found that 77% of respondents supported voter identification requirements.[3] *See* Stephen Ansolabehere and Elting R. Morison, *Access Versus Integrity in Voter Identification Requirements* (Feb. 2007) [hereinafter "Ansolabehere Survey"]. Within this poll, 51% of individuals who self-identified as "very liberal"

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[3] This data comports with a national Wall Street Journal/NBC poll conducted in April 2006, which showed that 81% of respondents nationwide supported (and only 7% opposed) photo identification requirements. *See* Hart/McInturff, *Study #6062, NBC News/Wall St. J. Survey*, at 13 (Apr. 2006), *available at* http://online.wsj.com/public/resources/documents/poll20060426.pdf.

supported voter identification laws.[4] *See id.* at 11 tbl.1.

Public support for voter identification requirements is validated by the fact that at least two jurisdictions – Arizona and Albuquerque, New Mexico – have adopted photo identification requirements by ballot initiative. In Arizona, 56% of voters approved Proposition 200, a 2004 statewide initiative requiring individuals to present photo identification and produce proof of citizenship before they could register to vote. *See* Ariz. Sec'y of State, *2004 General Election (Unofficial Results), available at* http://www.azsos.gov/results/2004/general/BM200.htm. The following year, 73% of Albuquerque, New Mexico, voters approved a local photo identification requirement, drawing overwhelming bi-partisan support that transcended income and racial divides. *See Unofficial Election Results for the City of Albuquerque Regular Municipal Election - October 4, 2005, available at http://www.bernco.gov/upload/images/clerk/past_elections/city_2005_10.html*; *see also* Dan McKay, *81% in Survey Back Photo ID for Voters*, Albuquerque J., Oct. 2, 2005, at B1.

Even the bi-partisan Baker-Carter Commission on Federal Election Reform ("Baker-

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[4] Public support also appears to transcend racial divides. *See* Ansolabehere Survey, at 5 (finding over 70% of whites, African-Americans, and Hispanics supported voter identification laws).

Carter Commission") – convened in part in response to the hard fought 2004 presidential election – recommended that all voters present photographic identification before being permitted to cast their ballot. *See Building Confidence in U.S. Elections: Report of the Baker-Carter Commission on Federal Election Reform*, at 18 (Sept. 2005) (noting that "some form of identification is needed" in today's urban, transient society, where 40 million people move each year) [hereinafter "Baker-Carter Commission Report"].

B. There Is No Evidence That Voter Identification Requirements Disparately Impact Any Particular Group Of Voters.

Despite Petitioners' unsupported arguments to the contrary, there is no evidence that voter identification requirements disparately impact any disadvantaged groups. Indeed, researchers at the Heritage Foundation found that African-American respondents in states that require or request photographic identification are *just as likely* to vote as African-American respondents in states that only require voters to state their name. *See* David B. Muhlhausen and Keri Weber Sikich, *New Analysis Shows Voter Identification Laws Do Not Reduce Turnout* 3 (Sept. 10, 2007) [hereinafter "Heritage Center Report"]. Likewise, the Heritage Center Report found that Hispanic respondents in photo identification states are *just as likely* to vote as Hispanic respondents in states that only require voters to state their name. *See id.*; *see also* Lonna

Rae Atkeson, et al., *New Barriers to Participation: Application of New Mexico's Voter Identification Law*, at 20 (presented at the 2007 Annual Meeting of the American Political Science Association) (finding evidence that Hispanics were *more likely* than non-Hispanics to provide some form of identification).

Another study, by researchers at California Institute of Technology, found similar results. *See* R. Michael Alvarez, Delia Bailey, and Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout* (Oct. 2007) [hereinafter "Cal Tech Study"]. The Cal Tech Study found that, after controlling for factors related to voter participation, there was "no evidence that voter identification [requirements] are racially discriminatory."[5] *Id.* at 18.

C. Photo Identification Requirements Have Been Implemented Without Disruption To The Administration Of Elections.

Finally, theoretical argument aside, photo identification requirements have proven to be problem-free in practical application. Recent elections in Indiana and Georgia (where a photo identification law similar to the Indiana law was adopted) demonstrate that such requirements

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[5] While the Cal Tech Study indicated that voter identification requirements may lead to noticeably lower levels of participation among registered voters generally, researchers could find "no evidence to support the hypothesis that [the lower participation effect] is more profound for nonwhite registered voters." Cal Tech Study, at 19.

facilitate, rather than inhibit, the coherent administration of elections. For example, in the November 2006 mid-term elections – the first mid-term statewide election since Indiana adopted its law – voter turnout did not decrease. Rather, turnout actually increased compared to analogous prior mid-term elections. *Compare* Ind. Sec'y of State, *2006 General Election Turnout and Registration* (40% voter turnout), *available at* http://www.in.gov/sos/elections/2006%20Municipal%20Registration%20and%20Turnout.pdf, *with* Ind. Sec'y of State, *2002 General Election Turnout and Registration* (39% voter turnout), *available at* http://www.in.gov/sos/elections/pdfs/2002_election_report/part2.pdf.

In Georgia, local elections in 23 counties were administered "without a hitch" in the state's first election conducted under its new photo identification requirement. Shannon McCaffrey, *Georgia Voter ID Law Passes Test*, AP, Sept. 18, 2007. In fact, according to state election officials, only eight voters ultimately cast provisional ballots because they lacked the appropriate photo identification needed to cast a ballot. *See* Shannon McCaffrey, *Few Lacked Photo ID in Georgia's Sept. 18 Election*, AP, Sept. 26, 2007. The experiences in Indiana and Georgia, supported by solid research, confirm that voter identification requirements are reasonable measures that do not deter voters from voting nor distract from the orderly administration of elections.

D. The Republican National Committee Has An Interest In Ensuring That Voter Confidence In Election Results Is Not Undermined.

Finally, the Republican Party, like the State of Indiana, has an interest in promoting confidence in elections and election results. The RNC's effort to grow the Republican Party and to turn voters out to the polls is all part of an effort to elect Republican candidates.[6] This is not a conspiracy. Electing its candidates to office is the primary focus of any national political party, because holding office is the best way for a party to put its principles and ideals into practice.[7] Fraud and the perception of fraud in the election process erode voter confidence, and casts doubt on election results. In short, such fraud undermines everything the Republican Party works to accomplish.

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[6] The Republican Party as a whole, in just the last two election cycles, has spent *millions* of dollars engaged in voter outreach and voter registration programs, and will do so again in the 2008 election cycle. As a result of the RNC's voter registration programs over the last two election cycles, over one million new voters have been registered to vote. Indeed, these efforts combined with the Republican Party's voter turnout programs have resulted in millions of new voters participating in our democratic process.

[7] The Democratic National Committee's website, in a section titled "What We Do," states that one of the primary functions of the DNC is "promot[ing] the election of Party candidates with both technical and financial support." Democratic Nat'l Comm., *What We Do*, *available at* http://www.dnc.org/a/party/aboutDNC.html.

II. PHOTO IDENTIFICATION IS A COMMON SENSE MEANS OF COMBATING VOTE FRAUD AND THE PERCEPTION OF VOTE FRAUD.

Opponents of Indiana's photo identification statute also argue that it is wholly unnecessary, because vote fraud is "non-existent." Br. of Pet. ACLU of Ind., at 42. This assertion is dubious enough, even without the existing contradictory facts. Regardless, there is no authority that prevents Indiana from taking a reasonable administrative step to prevent the threat of, and combat, vote fraud.

This Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Accordingly, safeguards are built into the American electoral system, such as advanced registration and residency requirements, to help ensure that elections are fair and honest. Such safeguards act to protect, rather than interfere with, the right to vote. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). To be sure, 25 states currently require or request all voters to present some form of identification verification at the polls. *See* Electionline.org, *Voter ID Laws, available at* http://www.electiononline.org/ (last updated Sept. 18, 2007). Of those, seven states – Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, and South

Dakota – require or request all voters to provide photo identification. *See id.*

A. Photo Identification Is A Fundamental Part Of Living In Modern Society.

Photo identification requirements are consistent with the 2005 recommendations of the Baker-Carter Commission, which recognized that, with the enactment of the federal REAL ID program, photo identification is required to conduct some of the most basic, routine transactions and activities. *See* Baker-Carter Commission Report, at 18 ("Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important."). Indeed, photo identification is vital to obtain employment, open a bank account, purchase certain goods and services, qualify for government entitlement programs, and even to exercise the right of access to federal courts. Congress recognized as much when it debated legislation concerning national standards for state driver's licenses and identification cards: not only has the driver's license become the "foundation of your identity," it also has "come to represent more than authorization to operate a motor vehicle; it imparts a stamp of legitimacy and is often taken as unquestionable proof of identity." 150 Cong. Rec. H8664-02, H8682-83 (Oct. 7, 2004)(statement of Rep. Moran). If such requirements can also help protect the integrity of the electoral system, all the better.

B. Vote Fraud Is Non-Fiction.

Although the precise extent to which in-person vote fraud occurs is unknown (because of the lack of research and the difficulty of collecting data), several independent sources confirm that instances of vote fraud plague federal, state, and local elections. *First*, Congress recognized the need to prevent vote fraud when it passed the Help America Vote Act of 2002 (HAVA). *See* 148 Cong. Rec. S10419, S10489 (Oct. 15, 2002) ("By passage of this legislation, Congress has made a statement that vote fraud exists in this country.")(statement of Sen. Bond); *see also id.* at S10419 ("To protect the integrity of every election, this conference report makes significant advancements in rooting out vote fraud.")(statement of Sen. McConnell). *Second*, the bi-partisan Baker-Carter Commission declared that "there is *no doubt* that [fraud] occurs." Baker-Carter Commission Report, at 18 (emphasis added). *Third*, media outlets around the country routinely cover stories of vote fraud allegations, investigations, and prosecutions. *See, e.g.*, Republican Nat'l Comm., *You Can't Make This Up!*, *available at* http://www.gop.com/flexpage.aspx?area=YCMTU (collecting media reports of vote fraud investigations and indictments); Am. Ctr. for Voting Rights, *Vote Fraud, Intimidation & Suppression in the 2004 Presidential Election* (Aug. 2, 2005) (collecting media reports concerning allegations of vote fraud during the 2004 election cycle). Certainly, vote fraud is not a "hypothetical" problem, as Petitioners' claim.

C. Vote Fraud – Even In Small Amounts – Can Affect The Outcome Of Elections.

Historical election data make clear that close elections are becoming the norm.[8] *See* Nat'l Comm'n on Fed. Election Reform, Task Force Report, *To Assure Pride and Confidence in the Electoral Process* (Aug. 2001). Indeed, elections today are often won by narrow margins. For example, in 2006, at least five races were won by margins less than 1,000 votes. *See The Almanac of American Politics* 1820 (Michael Barone & Richard E. Cohen eds., 2008). Some were extraordinarily close – including the race for the Second Congressional District in Connecticut, which was decided by just 83 votes. *See* Conn. Sec'y of State, *Conn. State Register and Manual, Statement of Vote for November 7, 2006, available at* http://www.sots.ct.gov/RegisterManual/SectionVIII/SOV06Congress.htm#Second.

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[8] In a study analyzing election data from 1948 to 2000, the National Commission on Electoral Reform found that elections for presidential electors have been decided 31 times by less than 1% of the votes cast, while 4% of United States Senate seats, 2% of United States House of Representatives seats, and 5% of gubernatorial races have been won by that margin. More strikingly, the Commission found that, in any given year, there is a 71% likelihood that at least one Senate race will be decided within a 1% margin, a 90% likelihood that at least one state will have a presidential election decided within a 1% margin, and more than a 99% likelihood that at least one House race will be decided within a 1% margin. *See* Nat'l Comm'n on Fed. Election Reform, Task Force Report, at 2-4.

As the margin of victory narrows, the greater the effect of even one fraudulent vote. Thus, even minimal amounts of vote fraud can affect the outcome of an election. *See* Baker-Carter Commission Report, at 18 (concluding that fraud and multiple voting in U.S. elections exists, and that such behavior can "affect the outcome of a close election").

Vote fraud, whether sporadic or prolific, also has a more indirect effect of dampening the electorate's confidence in the American democratic system. *See id.* ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."). As the Court has previously explained, confidence in the American political system often is shaken by even the faintest tinges of corruption or impropriety. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding campaign finance restrictions on grounds of *appearance* of corruption even where there was no evidence that actual corruption had occurred). Multiple pollsters have demonstrated that the public has lost confidence in the voting process due to vote fraud. For example, *Rasmussen Reports* found that 59% of voters believed there to be "a lot" of fraud in elections, while a Gallup Poll following the 2000 election found that 67% of the electorate had only "'some' or 'very little' confidence in the way the votes are cast in our country," and a Zogby Poll found that 10% of all voters believe "that their votes are not counted accurately." *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 794 (S.D. Ind. 2005)(citations omitted). By reducing

public confidence, then, vote fraud and the perception of vote fraud pose a threat to our electoral system.

There have been many close elections in the past decade alone. Indeed, state election codes contemplate close elections, providing for canvassing and recount procedures.[9] But even those processes can be undermined by vote fraud and the perception of vote fraud. Therefore, if left unaddressed, the political environment becomes one in which all close elections end with some degree of doubt over whether vote fraud occurred and whether such fraud may have altered the outcome.

For example, the Washington State gubernatorial race in 2004 was extraordinarily close. With over 2.9 million votes cast in that election, Republican Dino Rossi won the first tally by a margin of 261 votes over Democrat Christine Gregoire. *See Washington GOP Allege Dems Stole Governor's Seat*, AP, May 23, 2005. One columnist noted that the lead "was changing hands almost by the hour." Dean Paton, *The Race for Governor that Simply Won't End*, The Christian Sci. Monitor, Nov 22, 2004. A machine recount maintained Rossi's victory with a narrower margin of 42 votes, but a

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[9] Procedures both to improve vote counting and to reduce vote fraud both have been addressed at the federal and state levels. For example, the Help America Vote Act (HAVA) set "minimum requirements" for states to follow. Pub. L. No. 107-252, 116 Stat. 166, § 304 (2002). The passage of HAVA spurred many states to consider and adopt legislation similar to the Indiana law, to ensure that their elections are fraud-free.

hand recount of the ballots gave Gregoire a 129-vote advantage. *See Borders v. King County*, No. 05-2-0027-3, slip op. at 5 (Chelan County Super. Ct. June 24, 2005).

Confidence in such a close election is unfortunately compromised by illegitimate votes. Comparisons between the Washington Secretary of State's statewide voter file and other databases showed multiple instances of specific fraudulent and improper behavior. *See* Chris McGann, *State GOP Gets Specific About Election Charges*, Seattle Post-Intelligencer, Jan. 19, 2005, at A1. The comparisons found that:

- 437 provisional ballots were counted without first being verified;
- 37 felons had voted in the election who did not have voting rights restored;
- 9 dead people were credited with voting;
- 20 people voted both in Washington and another state; and
- 10 people voted twice.

Id. Thus, such preliminary analysis alone found at least 513 improper or fraudulent votes. In an election where the margin ranged from 261 to as narrow as 42 votes, such fraudulent behavior more likely than not altered the outcome of the election. Dino Rossi challenged approximately 2,200 votes that could not "be matched with voters credited with casting a ballot, so-called 'mystery voters.'" *Id.* State officials alarmingly responded that such

irregularities happen in "every election and that the lists are never meant to match up vote for vote." *Id.*

Despite finding 1,678 illegally cast votes in that state, Chelan County Superior Court Judge John E. Bridges upheld the election of Christine Gregoire because he concluded that it was ultimately impossible to correctly subtract and attribute those votes to either candidate. *See Borders*, slip op. at 5, 19. One year later, *The Seattle Times* reported that the Secretary of State's Office had, following the election, deleted 55,000 registrations from the state's voter registration rolls "after finding [35,445] duplicate records and [19,579] dead voters." Andrew Garber, *State Purges 55,000 Dead and Duplicate Voters from Database*, The Seattle Times, May 13, 2006, at B1. Additionally, 30 cases of possible double voting were forwarded to county officials for investigation.[10] *Id.*

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[10] Unfortunately, the vote irregularities experienced in Washington are not unique. For example, problems also existed in Wisconsin, where a joint federal task force was convened to investigate allegations of widespread fraud. *See* Greg J. Borowski, *Inquiry Finds Evidence of Fraud in Election*, Milwaukee J.-Sentinel, May 11, 2005, at 1. Additionally, a 2005 Tennessee special state senate race was overturned following allegations of vote fraud. *See* Lucas L. Johnson II, *Tennessee Senate Votes to Oust Member*, AP, Apr. 20, 2006.

D. The Perception Of Fraud Undermines The Electoral System, And Erodes Public Confidence In Election Results.

Finally, Petitioners make the odd argument that Indiana's law should be invalidated because it does not address absentee ballot fraud – or, in their words, the "real problem[ ]." Br. of Pet. Ind. Democratic Party, at 40; *see also id.* at 47. The Indiana legislature, however, is not required to address each and every aspect of vote fraud at once. *See* Tr. of Oral Argument at 18, *McConnell*, 540 U.S. 93 (No. 02-1674) ("the general rule of constitutional law and every other law is Congress doesn't have to solve every problem") (J. Breyer); *see also Williamson v. Lee Optical of Oklahoma*, 348 U.S. 461, 465 (1955) (legislature is free to address "the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of one field and apply a remedy there, neglecting others."). Indeed, the recognition by Petitioners that vote fraud *is* a problem in absentee voting only underscores why the Indiana legislature would wish to take steps to prevent such fraud elsewhere.

Notably, Petitioners do not address the impact that the perception of vote fraud has on the electoral system, nor Indiana's interest in acting to reduce any such perception. Vote fraud is not a victimless crime. It diminishes and marginalizes the vote of every eligible voter who takes the time and effort to vote, and it undermines the legitimacy of the entire

election process. Thus, states can no longer rely on solely reactive measures to counter these damaging effects, nor do they need to. States must also be able to take *preventive* measures, including the adoption of reasonable anti-fraud rules and election administration procedures, to adequately address the threat that vote fraud imposes on the entire electoral system.

The Indiana law was enacted to reduce vote fraud, which the State claims impairs the right of legitimate voters to vote by diluting their legitimate votes. *See* Br. of State Respondents, at 5-7 (describing the environment of inflated voter registration lists throughout the state and nationwide reports of in-person vote fraud). Affirming the constitutionality of the Indiana law, the Seventh Circuit recognized the discrepancy between the number of people listed on the voter registration rolls and the substantially smaller number of people actually eligible to vote as indirect evidence of vote fraud, or at least of an acute danger of such fraud. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953. Further, the Seventh Circuit found that this "[i]ndirect evidence of [voter] fraud, or at least of an acute danger of such fraud," was sufficient justification to uphold the Indiana law. *Id.*; *see also McConnell*, 540 U.S. at 143. The existence of data supporting the proposition that vote fraud – even in small amounts or isolated incidences – tarnishes the credibility of our electoral system, and is enough to uphold Indiana's photo identification law alone. *See McConnell*, 540 U.S. at 143-154.

The attendant loss of public confidence caused by vote fraud and the perception of vote fraud underscores the need for preventive state action like the Indiana statute. *See Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (recognizing the importance of preventing "the eroding of public confidence in the electoral process through the appearance of corruption"). Indeed, this Court recently reversed a procedural challenge to the Arizona voter identification and citizenship requirements stemming from the November 2006 election, noting that

> "[c]onfidence in our electoral processes is essential to our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."

Purcell v. Gonzales, ___ U.S. ___, 127 S. Ct. 5, 6 (2006)(citation omitted). Likewise, the Indiana law should be upheld as an effective, common sense measure that prevents vote fraud and increases public confidence in the election process.

CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to affirm the Seventh Circuit decision.

Respectfully submitted,

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IN THE

United States Supreme Court

WILLIAM CRAWFORD, *et al.*,
Petitioners,

– v. –

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

– v. –

TODD ROKITA, in his official capacity as Indiana Secretary of State, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF ROCK THE VOTE, NATIONAL BLACK LAW STUDENTS ASSOCIATION, NATIONAL BLACK GRADUATE STUDENT ASSOCIATION, THE FEMINIST MAJORITY FOUNDATION AND THE STUDENT ASSOCIATION FOR VOTER EMPOWERMENT SUPPORTING PETITIONERS

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STATEMENT OF INTEREST[1]

Rock the Vote

Rock the Vote is a nonprofit, nonpartisan organization founded in 1990 whose mission is to build the political clout and engagement of young Americans. Rock the Vote uses music, popular culture and new technologies to engage young people to register and vote in every election. It also gives young people the tools to identify, learn about and take action on the issues that affect their lives, and leverage their power in the political process. Rock the Vote uses the microphones of music, technology and youth culture to empower the 45 million young people in America who want to step up, claim their voice in the political process, and change the way politics is done.

The National Black Law Students Association

The National Black Law Students Association ("NBLSA") is the largest student-run organization in America representing over 6,000 African-American law students in the United States. In 1968, NBLSA was founded with the purpose to sensitize the law and legal profession to the ever-increasing needs of the African-American community. In efforts to

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

promote greater political participation in the African-American community, NBLSA participates in several programs to promote and protect citizens' right to vote.

The National Black Graduate Student Association

The National Black Graduate Student Association ("NBGSA") is the largest interdisciplinary graduate studies, student-run association in America representing over 100,000 African-American graduate and professional students in the United States. In 1989, NBGSA was founded with the major purposes of serving as an association to provide a support network where these graduate students can garner and direct their individual as well as collective resources for the betterment of all people of African descent through educational instruction, mentorship, research, and service. It is toward this noble end that NBGSA directs its mission and lodges its hope so to be ever vigilant in pressing toward the goals of self-determination, social justice, and human equality.

The Feminist Majority Foundation

The Feminist Majority Foundation ("FMF"), founded in 1987, is the largest feminist research and action organization dedicated to women's equality. FMF's programs focus on advancing the legal, social, and political equality of women with men, and recruiting and training young feminists for future leadership. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects,

and leadership training and development programs. The FMF CHOICES Campus Leadership Program reaches 1,954 colleges and universities nationwide through its on-line network and field organizing. Through its CHOICES Program, the FMF has devoted significant resources to student voter education and registration initiatives on college campuses to increase significantly young women's registration and voting. The FMF has filed numerous briefs amicus curiae in the United States Supreme Court and the federal circuit courts to advance the opportunities for women and girls.

The Student Association for Voter Empowerment

The Student Association for Voter Empowerment ("SAVE") is a nonprofit, nonpartisan organization on 22 college campuses founded to increase voter turnout among students by removing access barriers and promoting stronger civic education. In addition to advocating policy changes in the electoral process to supplement traditional Get-Out-the-Vote efforts, SAVE works with community leaders, high school teachers, college professors, state and federal legislators, and fellow students to build a strong venue in their community for political dialogue, voter awareness, and active civil engagement.

SUMMARY OF ARGUMENT

There are many critical errors in the Seventh Circuit's decision upholding Indiana's severely restrictive voter identification statute, Ind. Code Ann. § 3-5-2-40.5 (West 2007). One fundamental error is the Seventh Circuit's incorrect conclusion that the burden imposed by the statute was "slight." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *cert. granted*, 168 L. Ed 2d 809 (2007). The panel also turned the facts on their head by suggesting that voters who do not obtain a statutorily required identification are choosing to "disfranchise themselves" rather than go to "the expense of obtaining a photo id." *Id.* Contrary to the Seventh Circuit's ruling, the prohibitively and gratuitously strict identification requirements of the Indiana law and other similar state voter identification laws impose a severe and undue burden on qualified, duly registered citizens who do not have either a federal or state-issued photo identification or the means to conveniently obtain one, and therefore are improperly denied the fundamental constitutional right to vote in violation of the First and Fourteenth Amendments.

The severe adverse impact of the voter identification law is illustrated by an examination of the effect of the statute's requirements on eligible voters ages 18 to 29 years old ("Young Adult Voters"), the focus of this *amicus* brief. Young Adult Voters, many of whom are students, have long encountered unfair obstacles to voting and have had to combat efforts designed to undermine their strength as a potential voting bloc. Restrictive voter identification laws such as the Indiana statute constitute a new,

legislatively sanctioned means of unconstitutionally deterring Young Adult Voters from participating in the democratic process by exercising their franchise, thereby diminishing the potential strength of this class of voters. That is their effect, and possibly their intent.

As we show below, empirical data demonstrates that significant numbers of Young Adult Voters do not have the government-issued identification required to vote by laws like that challenged here and will face considerable, and in some instances insurmountable, obstacles in obtaining acceptable identification. The most common type of identification available that meets the statute's requirements is a driver's license, but high numbers of eligible Young Adult Voters either lack any driver's license at all or have one only from a state where they used to reside, not where they presently reside and would be voting. Many young eligible voters have recently changed their state of residence for the purpose of attending college, graduate school or other reasons, and are therefore unlikely to have sufficient in-state identification to vote, whether it is a driver's license or other identification adequate under the voter identification law. Young Adult Voters face particular difficulties obtaining such state-issued identification because they are much less likely to have, and cannot easily obtain, the types of documentation required for an acceptable state-issued identification, such as a birth certificate, passport or utility bills in their own name.

The hurdles that Indiana's voter identification statute poses to voting should trigger strict scrutiny to assess whether the measure advances a

compelling state interest and is narrowly tailored to serve that interest. The Indiana statute and comparable laws cannot withstand such scrutiny because the severe burden imposed by the law cannot be justified where there is no evidence whatsoever of *any* in-person voter impersonation fraud and where alternatives are available that will sufficiently protect the integrity of elections without infringing the fundamental right to vote. Accordingly, this Court should hold that voter identification statutes as restrictive as the Indiana law are unconstitutional.

ARGUMENT

INDIANA'S VOTER IDENTIFICATION LAW IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IMPOSES A SEVERE BURDEN ON, AND A RISK OF DISENFRANCHISEMENT OF, YOUNG ADULT VOTERS, WITHOUT ADEQUATE JUSTIFICATION

A. The Legal Standard

The right to vote has long been recognized by this Court as a "fundamental political right" that is "preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citation omitted); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (internal citation omitted); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969). The Court in *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964), identified voting's foundational role in our democracy:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

See also Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (The right to vote is "a fundamental political right, because preservative of all rights."); *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (the right to vote is "at the heart of our democracy").

Accordingly, this Court has held that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." ***Reynolds***, 377 U.S. at 562. "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." ***Dunn v. Blumstein***, 405 U.S. 330, 336 (1972).

This Court in ***Burdick*** established that when an election law is challenged on constitutional grounds, the court

> *must weigh "the character and magnitude of the asserted injury* to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which

> those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)) (emphasis added). If the regulation imposes a "severe" restriction, it survives scrutiny only if it is "narrowly drawn to advance a state interest of compelling importance." *Id.* (citations omitted). If it is a "reasonable, nondiscriminatory restriction[]," the State must show that "important regulatory interests . . . justify the restrictions." *Id.* (citations and internal quotations omitted).

B. The Restrictive Requirements of Indiana's Voter Identification Statute

The Seventh Circuit grossly underestimated the character and magnitude of the injury created by Indiana's voter identification law. As illustrated by the Young Adult Voters profiled here, the requirement to present a federal or Indiana state-issued photo identification in order for an already registered voter to vote in person constitutes a "severe" restriction that will disenfranchise otherwise qualified voters, and, therefore, under *Burdick*, should be strictly scrutinized.

Under Indiana law, anyone who is at least 18 years old, is a United States citizen, and resides in an election precinct continuously for at least 30 days prior to an election is qualified to vote. Ind. Code Ann. § 3-7-13-1 (West 2007). Following amendments to the law, effective July 1, 2005, qualified Indiana voters, unless specifically exempt by statute, must present "proof of identification" to vote in-person.

Ind. Code Ann. § 3-11-8-25.1 (West 2007). No identification is required to vote by absentee ballot. Ind. Code Ann. § 3-11-10-24 (West 2007).[2]

Such "proof of identification" is limited to

> a document that satisfies *all* the following:
>
> (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record.
>
> (2) The document shows a photograph of the individual to whom the document was issued.
>
> (3) The document includes an expiration date, and the document:
>
> (A) is not expired; or
>
> (B) expired after the date of the most recent general election.
>
> (4) The document was issued by the United States or the state of Indiana.

Ind. Code Ann. § 3-5-2-40.5 (West 2007) (emphasis added).

A voter who shows up at the polls without the above-defined identification may vote by provisional

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[2] Voting by absentee ballot is restricted to voters who satisfy one of the enumerated statutory requirements set forth in Ind. Code Ann. § 3-11-10-24 (West 2007). The statute does not permit a qualified voter to submit an absentee ballot because he or she does not have, or is unable to obtain by Election Day, the requisite government-issued photo identification.

ballot only, and her ballot is valid only if within 10 days of the election, she goes to the county clerk or election board with the proof of identification required by the statute or to execute an affidavit establishing that she is unable to obtain the required identification due to indigency or religious objection. Ind. Code Ann. §§ 3-11-8-25.1; 3-11.7-5-2.5; 3-11.7-5-1 (West 2007).

The photo identification law does not apply uniformly to all voters. Proof of identification is not required for voters who live at a state licensed care facility, such as a nursing home, and vote in person in that facility. Ind. Code Ann. § 3-11-8-25.1(e) (West 2007). As discussed above, voters who are eligible to vote by absentee ballot, who are indigent and unable to obtain the necessary identification, who have a valid religious objection to being photographed, or who reside and vote in a state-licensed facility, can exercise their fundamental right to vote without presenting government-issued, unexpired, photo identification.

The voter identification requirements in Indiana are far more restrictive than in most other states. Twenty-four states do not require identification to vote, other than for first time voters who did not register in person as required by the Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252.[3]

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[3] Those states are California, District of Columbia, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Utah, Vermont, West Virginia, Wisconsin and Wyoming. *See* Election Reform Information Project, ***Voter ID Laws***, http://www.electionline.org/Default.aspx?tabid=364

Most states that do have voter identification requirements for all voters are far less restrictive than Indiana's statute because, like HAVA, they accept a much broader range of documents as proof of identity (*e.g.*, employee or student identification or utility bills), or allow voters who lack the specified identification to vote in person after executing an identity-affirming affidavit. [4] Currently the only other state that is as restrictive as Indiana and accepts only government-issued, expiring photo identification is Georgia. Arizona also has fairly restrictive voter identification requirements, but allows eligible voters to cast their ballots in person if they present identification bearing the voter's name and current address, either one photo identification or two forms of non-photo identification, such as a current bill or bank statement. The Missouri legislature had enacted a similarly restrictive photo voter identification law, but it was found unlawful under Missouri's state constitution. ***Weinschenk v. State***, 203 S.W.3d 201, 204 (Mo. 2006).

(summarizing voter identification requirements in all states and District of Columbia) (last visited Nov. 1, 2007).

[4] States that have more permissive voter identification laws include Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Louisiana, Michigan, Missouri, Montana, New Mexico, North Dakota, Ohio, South Dakota, Tennessee and Washington. *Id.*

C. The Indiana Voter Identification Law Will Discourage Participation In The Democratic Process By Young Adult Voters

Young Adult Voters have long faced considerable obstacles to exercise their fundamental right to vote. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the United States Supreme Court overturned the portions of a federal voting rights statute which lowered the minimum voting age from 18 to 21 for state elections. Thereafter, in 1971 the 26th Amendment was passed and ratified in response to the Supreme Court's ruling. As explained by the Supreme Court of New Jersey in *Worden v. Mercer County Board Of Elections*, the purpose of the 26th Amendment was

> not only [to] extend[ ] the voting right to younger voters but also [to] encourage[e] their participation by the elimination of all unnecessary burdens and barriers. Thus the Senate Report specifically noted . . . that 'forcing young voters to undertake special burdens – obtaining absentee ballots, or traveling to one centralized location in each city, for example – in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th

> Amendment right to equal protection of the laws in the exercise of the franchise.' It is significant that the twenty-sixth amendment prohibited not only denial but also abridgment of the voting rights granted to the younger voters, many of whom as the congressional and legislative members well know, would be resident in their college communities at election time.

294 A.2d 233, 237 (N.J. 1972) (internal citations omitted).

Despite the passage of the 26th Amendment, efforts continued to try to restrict the rights of young adults to vote, particularly of students. *See, e.g., Symm v. United States*, 439 U.S. 1105 (1979) (striking down as unconstitutional county official's policy of only registering those students who were natives of the county, whose family lived in the county, or those who had been promised a job in the county); *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973) (challenge to special caucus for town elections held when University of Massachusetts students were on semester recess); *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973) (holding statutory presumption that students were not residents, which made them ineligible to vote, unconstitutional); *Levy v. Scranton*, 780 F. Supp. 897 (N.D.N.Y. 1991) (Saratoga County's Board of Elections held to have unconstitutionally denied Skidmore College students the right to vote solely because they lived in on-campus housing); *Paulson v. Forest City Cmty. Sch. Dist. in Winnebago*, 238 N.W.2d 344 (Iowa 1976) (voters and taxpayers sued to contest a school district bond

election claiming that several students at a college in the district who had voted were not qualified to vote); *DuBois v. City of Coll. Park*, 410 A.2d 577 (Md. Ct. App. 1980) (reapportionment plan for city council districts that excluded a large segment of students who lived in the University of Maryland dormitories violated the Equal Protection Clause of the Fourteenth Amendment). As illustrated by these cases, Young Adult Voters who are students commonly face unwarranted challenges or obstacles when they seek to register and vote in the jurisdiction where they are attending school. Gerrymandering of voting districts has also been used to diminish the political strength of student voters.

Young Adult Voters, however, have overcome such concerted efforts to discourage their participation in the electoral process. Recent election cycles have seen a dramatic resurgence of political participation and voter turnout from Young Adult Voters. This group of voters has become increasingly more active, vocal and is an important, growing force in the electoral process.

In 2004, voter turnout reached its highest level since the 1968 presidential election, and Young Adult Voters were instrumental in that achievement as nearly five million more Young Adult Voters voted in 2004 than in 2000. *See* Thomas R. Patterson, ***Final Report: Young Voters and the 2004 Election*** (Feb. 2, 2005).[5] This spike in participation by Young

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[5] http://www.ksg.harvard.edu/presspol/vanishvoter/Releases/Vanishing_Voter_Final_Report_2004_Election.pdf (last visited Nov. 8, 2007).

Adult Voters is a recent happening. In 2000, approximately 40% of this age group voted in the presidential election, but in 2004, that number rose to 49%, an increase of 4.3 million voters in this age group, for a total of 20.1 million votes. Mark Hugo Lopez, Emily Kirby and Jared Sared Sagoff, ***The Youth Vote 2004***, July 2005, Graph 2 & Table 2.[6] Notably, this revitalization of voting by young people has dramatically eclipsed that of the general population. ***See*** Press Release, New Voters Project, ***New Poll: More Young People Paying Attention to the 2008 Election*** (June 28, 2007).[7] For example, "In 2004, young voter (18-29 year olds) turnout was up 9 percent over 2000 levels – a rate three times higher than the general population." ***Id.***

The trend of increased Young Adult Voter participation continued during the 2006 election cycle. An analysis of 36 precincts in Ohio, Connecticut, Iowa, Colorado and Michigan targeted by the Student Public Interest Research Group's New Voters Project found that young voter (18-24 year olds) turnout increased for the third straight year, and the average turnout in those precincts increased ***157%*** over 2002. Press Release, Student PIRGs' New Voters Project, ***Student PIRGs' New Voters Project Posts Huge Vote Increases*** (Nov. 8, 2006). [8]

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[6] http://www.civicyouth.org/PopUps/FactSheets/FS_Youth_Voting_72-04.pdf (last visited Nov. 8, 2007).

[7] http://www.newvotersproject.org/news-room/releases/new-poll-more-young-people-paying-attention-to-the-2008-election#h7NB4ZQX80Mw66m5t9Wg8w (last visited Nov. 1, 2007).

[8] http://www.washpirgstudents.org/news/recent-news/vote-increases (last visited Nov. 1, 2007).

Nationwide figures for 2006 show the same increases, 8.9 million 18-29 year old voters (22.5%) voted in 2002 and 10.8 million voters (25.5%) voted in 2006. Mark Hugo Lopez, Karlo Barrios Marrelo & Emily Hoban Kirby, *Youth Voter Turnout Increases in 2006*, Table 1.[9]

This strong momentum is not waning. A recent poll conducted by The New York Times of 17-29 year old voters strongly suggests that the current generation of young people will continue to participate in the political process in increasingly high numbers. According to the poll, 58% said they are paying attention to the 2008 elections, compared to just 35% in 2004. *More Young People Paying Attention to the 2008 Election* at 1. Further, nearly 75% reported that they are registered to vote. *Id.* Likewise, a recent poll by the Pew Research Center found that 38% of 18-29 year olds have watched candidate debates, which was about the same as 30-49 year olds and 50-64 year olds. *See* Rock the Vote, *Polling Young Voters Volume VI* (Sept. 2007).[10]

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[9] http://www.civicyouth.org/PopUps/FactSheets/FS07_2006MidtermCPS.pdf (last visited Nov. 8, 2007).

[10] http://www.youngvoterstrategies.org/index.php?tg=fileman&idx=get&inl=1&id=1&gr=Y&path=Research&file=Polling+Young+Voters+Volume+VI.pdf (last visited Nov. 8, 2007). Recent innovations in campaigning through the use of technologies that are particularly effective in reaching younger voters are effectively increasing young voter participation and facilitating this voting group's enhanced role in the democratic process. One example is the YouTube/CNN debates in the current presidential campaign in which individuals posed questions to presidential candidates via video submissions. The Pew Report found that this novel debate format was particularly appealing to young voters, who were "more enthusiastic about the debate

The increase in voting and political participation is particularly striking among college students. A nationwide survey of college students showed that 77% of polled college students voted in the 2004 presidential election. *See* Richard Niemi and Michael Hanmer, *College Students in the 2004 Election* (Nov. 2004).[11] But critically, evidence from the survey indicated that students were more likely to vote if they could register and vote at their campus addresses. Voter turnout for students who were registered at home and did not change their registration was approximately 8% lower than students who registered at school for the first time, and approximately 10% lower than those who switched their registration from their home address to their school address. *Id.*

As discussed in the following section, the Indiana voter identification law makes it substantially more difficult for Young Adult Voters to cast their ballots in person. Indiana's imposition of substantial hurdles is particularly questionable in view of the

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format than their older counterparts." *Id.* at 1. Another example is the use of text messaging by political campaigns to reach potential supporters. A recent study found that text messaging reminders to new voters increased an individual's likelihood of voting by 4.2%. Student PIRGs' New Voters Project, ***Text/SMS Messaging is an Effective Method for Engaging Young Voters*** (Sept. 6, 2007), http://www.newvotersproject.org/uploads/mr/8F/mr8FwQEPpPfJLKtQa8TEkw/Text-Messaging-Fact-Sheet.pdf (last visited Nov. 1, 2007).

[11] http://www.civicyouth.org/PopUps/FactSheets/FS_College_Voting.pdf.

evidence that Young Adult Voters have been voting at historically high rates, approaching or even surpassing their older counterparts. By imposing onerous and unnecessary obstacles that disproportionately hinder Young Adult Voters' right to vote, the Indiana statute suppresses the participation of this class of voters and is even worse for minority Young Adult Voters.[12] In its effect, the Indiana statute and similarly restrictive voter identification laws in other jurisdictions constitute a return to the tactics discussed above that were designed to exclude younger voters from the process and which are forbidden by the 26th Amendment.

D. Significant Numbers of Young Adult Voters Do Not Have Identification that Satisfies the Statutory Requirements or the Means of Obtaining It

The restrictions imposed by the Indiana voter identification law and similar statutes in other states are particularly burdensome for, and will substantially deter, Young Adult Voters from participating in the electoral process and exercising their right to vote.

It is common ground that Indiana driver's licenses or non-driver's identification cards issued by the Indiana Bureau of Motor Vehicles ("IBMV") are the forms of identification that would most often be used to meet the statutory requirements, but many Young Adult Voters are unlikely to have either form

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[12] *See* note 16 *infra* and accompanying text.

of identification.[13] A recent survey of registered voters in Indiana found that more than 20% of younger voters (in particular, those between the ages of 18 to 24 years old) did not have access to valid photo identification. Matt A. Barreto, Stephen A. Nuño and Gabriel Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate*, Fig. 2 (Nov. 8, 2007).

Nationwide a substantial percentage of individuals 18 to 29 years old do not have a valid driver's license. Federal Highway Administration data from 2005 estimates that for this age group, 32.4% of 18 year olds, 25.1% of 19 year olds, 22.2% of 20 year olds, 20.7% of 21 year olds, 19.1% of 22 year olds, 17.1% of 23 year olds, 16.7% of 24 year olds, and 12.6% of 25-29 year olds, did not have a driver's license. *See* U. S. Dep't of Transp. Fed. Highway Admin., *Highway Statistics 2005: Driver Licensing* (Feb. 2, 2007).[14] In Indiana, more than 15% of 20 to

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[13] Another form of government identification that would meet the statutory requirements would be a United States passport. However, as of 2005, only approximately 60 million U.S. citizens had passports. U.S. State Dep't, *Special Briefing: Western Hemisphere Travel Initiative*, 4 (Apr. 5, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/44286.html. That number represents only approximately 31% of all citizens. U.S. Census Bureau, *Current Population Reports, Voting and Registration in the Election of November 2002*, 2 Fig. 1 (July 2004), *available at* http://www.census.gov/prod/2004pubs/p20-552.pdf.

[14] http://www.fhwa.dot.gov/policy/ohim/hs05/pdf/dl22.pdf, *Chart of Licensed drivers, by sex and percentage in each age group*.

24 years olds and approximately 16% of 25 to 29 year olds were not licensed drivers in 2005. *Id.*[15]

The rate of young adults who are licensed drivers also varies with other factors, such as race, whether the individual lives in an urban area or whether the individual is a student originally from out of state. A recent study of the rates of young people in Wisconsin who do not have a valid driver's license examined a number of these factors. *See* John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, 1-2 (2005).[16] This study, completed in June 2005 by the Employment and Training Institute at the University of Wisconsin-Milwaukee using census data and data from the Wisconsin Department of Transportation, found that younger people were less likely to possess a driver's license. *Id.* at 1-2. The study also found that 78% of African-American males aged 18 to 24, 66% of African-American females aged 18 to 24, 57% of Latino males aged 18 to 24, and 63 % of Latino females aged 18 to 24 lacked a valid driver's license. *Id.* at 4-5.[17]

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[15] *See also* Barreto, Table 1.1 (noting that more than 25% of registered Indiana voters between 18 and 34 years old did not have a valid driver's license).

[16] http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (last visited Oct. 29, 2007).

[17] Notably, minority males aged 18 to 29 are already a voting population that is dramatically under-represented: minority voter registration and turnout is lowest among young minority men. According to a review of voter participation in the 2006 elections based on the United States Census Bureau's Current Population Survey, only one in five black men aged 18 to 29 voted in 2006. *See* Douglas R. Hess, Representational Bias in

The University of Wisconsin-Milwaukee study also found that transient populations, which included out-of-state students, were less likely to have valid driver's licenses. Less than 3% of the 12,624 students living in the residence dorms at Marquette University, the University of Wisconsin-Madison, and the University of Wisconsin-Milwaukee had driver's licenses that listed their dorm address. Pawasarat at 11-12. As noted above, "[a]bout 1 in 6 Americans move each year" and students move even more frequently than the average. *See* Kristin A. Hansen, U.S. Census Bureau, *Geographical Mobility* (Jan. 2001).[18] *See also* Spencer Overton and the Brennan Center for Justice, ***Response to the Report of the 2005 Commission on Federal Election Reform*** (Sept. 19, 2005).[19]

The rates of licensed drivers among young adults in Indiana are likely to be affected by similar factors. Approximately 12% of persons living in Indiana in

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the 2006 Electorate (Sept. 2007), http://projectvote.org/fileadmin/ProjectVote/Publications/Representational_bias_report_2006.pdf (last visited Oct. 29, 2007). Only 42% of the voting eligible population of Black men aged 18 to 29 were registered, 36% of the voting eligible Asian men aged 18 to 29 were registered, and 41% of the voting eligible Latino men aged 18 to 29 were registered. *Id.* at 14. Of these populations only 48%, 37%, and 43% respectively of those percentages registered actually voted in 2006. *Id.*

[18] http://www.census.gov/population/www/pop-profile/geomob.html. The same 2001 Census Report concluded that approximately 75% of moving individuals move within the same state, and thus these individuals would have no reason unrelated to voting to obtain a new driver's license. *Id.*

[19] http://www.carterbakerdissent.com/final_carterbaker_rebutta l092005.pdf (last visited Oct. 30, 2007)

2000 identified themselves as a race other than White. U.S. Census Bureau, *Profile of General Demographic Characteristics: 2000.* [20] Approximately 21% of the Indiana population in 2000 was between 20 and 34 years old. *Id.*

A substantial number of young adults move to Indiana from out of state to attend school and, therefore, are unlikely to have state-issued identification, even if they are licensed drivers. In 2004, there were 356,801 students attending degree-granting institutions in Indiana. *See* U.S. Dept. of Education, Institute of Education Sciences, National Center for Educational Statistics, *State Education Data Profiles.*[21] Of the 64,000 freshman enrolled in degree-granting institutions in Indiana, 13,540 or about 22% moved into Indiana to attend school. *See* U.S. Dept. of Education, Institute of Education Sciences, National Center for Education Statistics, *Digest of Education Statistics.* [22] More recent enrollment figures from the two largest public universities in Indiana show similarly large numbers of students migrating into Indiana from out-of-state to attend school. For instance, at Indiana University, in fall 2006, over 14,000 students, or approximately 22.6% of its enrolled student body, were from outside of Indiana. *See* Indiana University Factbook 2006-

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[20] http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US18&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-_sse=on.

[21] http://nces.ed.gov/programs/digest/do5/tables/dt05_191.asp.

[22] http://nces.ed.gov/programs/digest/d06/tables/dt06_207.asp.

2007, 23.[23] At Purdue University, another large public university, during the 2005-06 school year, over 11,000, or a little over 40% of, students were from outside of Indiana. *See* Purdue University Chart of Enrollment by U.S. State and Region.[24] There are also significant numbers of students from outside of Indiana attending private colleges and universities in the state. At the University of Notre Dame, 63% of the freshman 2007 class of undergraduates, or approximately 1,250 of the enrolled class of 1,985, were from outside of the Midwest, and some portion of the Midwestern students were likely from outside of Indiana. *See* University of Notre Dame News and Information[25]; University of Notre Dame Office of Undergraduate Admissions Statistics.[26] Among the undergraduates at Butler University in 2005-06, approximately 1,700 were from outside of the state. Butler University Office of Institutional Research and Assessment, ***Residences of Full-Time Undergraduates by State.***[27]

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[23] http://factbook.indiana.edu/fbook06/fact_book_0607.pdf (last visited Oct. 23, 2007).

[24] http://www.pmc.purdue.edu/datadigest/2005_06/pages/students/stu_res.html (last visited Oct. 23, 2007).

[25] http://newsinfo.nd.edu/content.cfm?topicid=15 (last visited Oct. 23, 2007).

[26] http://admissions.nd.edu/admission-and-application/admissions-statistics (last visited Oct. 30, 2007).

[27] http://www.butler.edu/oir/Tables/pdf_2002/Table%201.14.pdf (last visited Oct. 23, 2007). The influx of students into Indiana to attend school is hardly unique, and other states as well have many students arriving from other states. For instance, in 2004, more than 36,000 freshmen in New York State colleges and universities were from outside of the state. Sam Roberts, "For

Thus, a large segment of the student population (those that attend school out-of-state) will be unable to vote at their college address. Given the bureaucratic hurdles that college students must surmount to vote at school, the Indiana voter identification law makes voting at one's college address exceedingly difficult and thus is a significant deterrent to voting.

Eligible student voters attending private higher education programs in Indiana cannot use their student photo identification cards to vote (because it is not state-issued). Student identification cards from many public universities in Indiana are also

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Freshmen Heading Out of State, New York Is Top Choice," *New York Times* (July 14, 2006), *available at* http://www.nytimes.com/2006/07/14/nyregion/14ice.html?_r=1&oref=slogin. Nationwide, in the fall of 2004, 19% of all freshmen students enrolled in degree-granting institutions in the United States were attending a school outside of their home state. *See* U.S. Dept. of Education, Institute of Education Sciences, National Center for Education Statistics, *Digest of Education Statistics, available at* http://nces.ed.gov/programs/digest/d06/tables/dt06_207.asp.

Younger people are among the most transient in our nation. Over one-third of persons aged 20 to 24 are likely to have moved in the past year. 35.8% of persons 20 to 24 years old moved between 1992 and 1993, which was about twice the annual rate found for all persons 1 year old and over, 16.8%. *See* Kristin A. Hansen, U.S. Census Bureau, *Geographical Mobility* (January 2001), *available at* http://www.census.gov/population/www/pop-profile/geomob.html. Renters, such as students living in off-campus housing, are also much more likely to move. About one-third of persons living in renter-occupied housing units in March 1993 had moved in the previous year (32.9%). *Id.* In contrast, fewer than 1 in 10 persons in owner-occupied housing units had moved in the same period (9.1%). *Id.*

unacceptable because they lack an expiration date, affecting a huge number of students. For example, the student identification cards at the following public universities do not satisfy the statutory requirements: Indiana State University, with student enrollment of approximately 10,700, *see* Indiana State University Fast Facts [28]; Indiana University-Purdue University Indianapolis, with student enrollment of approximately 30,000, *see* University Reporting & Research, Indiana University Enrollment, First Semester, 2007-2008, at 4[29]; Purdue University-West Lafayette, with student enrollment of approximately 39,000, *see* Purdue University, About Purdue University [30]; and the University of Southern Indiana, with student enrollment of approximately 10,000, *see* University of Southern Indiana Fast Facts.[31]

Thus, Young Adult Voters who cannot rely on their student identification to vote, who do not have a passport, and have recently relocated to Indiana likely will need to obtain state-issued identification from the IBMV. Obtaining one (whether a driver's license or non-driver's identification) is an arduous process in light of the nature and extent of documentation required by the IBMV.

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[28] http://web.indstate.edu/news/fastfacts.html (last visited Nov. 5, 2007).

[29] http://factbook.indiana.edu/~urr/enrollment/2007-08/enrollment_full_report_4078.pdf (last visited Nov. 5, 2007).

[30] http://www.purdue.edu/Purdue/about/index.html (last visited Nov. 5, 2007).

[31] http://www.usi.edu/facts/index.asp (last visited Nov. 5, 2007).

To obtain a new Indiana license or non-driver's identification card, an individual must present to the IBMV two documents proving identification, including at least one "primary" document. *See* Indiana Bureau of Motor Vehicles Identification Requirements. [32] Primary documents must be original documents or stamped or sealed facsimiles. Primary documents include a birth certificate; a certificate of Naturalization/Citizenship; a certification of report of birth; a U.S. consular report of birth; a U.S. Veterans Universal Access Identification card with photo; a U.S. Military/Merchant Marines identification card with photo; a U.S. Passport; a valid foreign passport with photo and a visa that includes a valid form I-94 indicating the authorized duration of stay in the United States; or a valid foreign passport with a current visa that states, "Upon Endorsement Serves as a Temporary I-551 evidencing Permanent Residence for 1 year." *Id.* Secondary documents include a wider array of documentation, but Young Adult Voters, particularly those individuals who live in a dormitory or a sublet, who are non-drivers, not employed, and have limited incomes, may not readily have even one of the secondary documents.

As most voters will not have a passport, military, or veteran's ID, one of the more common forms of primary document used is a birth certificate. Indiana only accepts, however, a birth certificate with an authenticating stamp or seal containing the applicant's date of birth, place of birth, and parent's

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[32] http://www.in.gov/bmv/driverlicense/idreq.html (last visited Oct. 30, 2007).

names issued by a county department or county board of health from the applicant's state of birth, a state department or state board of health from the applicant's state of birth, or a verified delayed birth certificate. *Id.* In Indiana, obtaining a certified copy of a birth certificate from a county board of health costs $10. *See* Indiana Commission of Public Records.[33] For individuals born in other states, the cost may be more. For instance, the total cost of obtaining a certified birth certificate from Boston, Massachusetts is $15. *See* City of Boston Registry Division Website.[34]

In addition to the expense, the process of obtaining a certified birth certificate from another state can be particularly difficult and time-consuming and may require numerous calls or actual visits to the appropriate out-of-state agency. For example, a Young Adult Voter residing in Indiana, who was born in New York City, would have to contact the New York City Department of Health and Mental Hygiene. *See* New York City Department of Health and Mental Hygiene Office of Vital Records Website.[35] Although the individual requesting a certified copy of his or her birth certificate may apply via internet, phone, mail, or fax, an individual must be prepared to supply all of the following information: full name as listed on the birth

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[33] http://www.in.gov/icpr/webfile/formsdiv/49607.pdf (last visited Oct. 30, 2007).

[34] http://www.cityofboston.gov/registry/registerbirth.asp (last visited Oct. 30, 2007).

[35] http://www.nyc.gov/html/doh/html/vr/vr.shtml (last visited Oct. 30, 2007).

certificate; sex; date of birth; mother's maiden name; father's full name if available; hospital or street where birth occurred and the borough; relationship to the person named on the birth certificate; reason for requesting the certificate; credit card number and credit card expiration date, daytime telephone number, billing address, and number of copies. *See, e.g.,* New York City Department of Health and Mental Hygiene Office of Vital Records Website.[36] The credit card must be in the name of the individual requesting the birth certificate. *Id.*

The fee for each birth certificate is $15, and a mailing fee of $5.50 is applied to each order. *See* New York City Department of Health and Mental Hygiene Office of Vital Records Website.[37]

In addition to establishing their identity through two documents, including one primary document, in order to obtain an IBMV license or identification the Young Adult Voter must also present proof of a Social Security number[38] or ineligibility and proof of Indiana residency. *See* Indiana Bureau of Motor Vehicles Identification Requirements.[39] Proof of

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[36] http://www.nyc.gov/html/doh/html/vr/vrbappl-4.shtml (last visited Nov. 1, 2007).

[37] http://www.nyc.gov/html/doh/html/vr/vrbappl-4.shtml (last visited Nov. 1, 2007).

[38] Proof of a Social Security number must include the card itself or another form of verified letter or report issued by the Social Security Administration. *See* Indiana Bureau of Motor Vehicles Identification Requirements, http://www.in.gov/bmv/driverlicense/idreq.html (last visited Oct. 30, 2007).

[39] http://www.in.gov/bmv/driverlicense/idreq.html (last visited Oct. 30, 2007).

Indiana residency thus may require yet another document that contains the applicant's name and residential address. *Id.*[40] (IBMV provides that in some instances a primary or secondary document may be used as proof of Indiana residency along with one of select types of documents provided the document contains the applicant's name and residential address). For an out-of-state student, obtaining acceptable documentation of residence may prove difficult because a student voter who lives in a dormitory or rents an apartment with others may not have bills in his or her name. The utilities may be billed to the university, the landlord or a roommate. A student voter from out of state also may not have a bank account with a local Indiana address. Mailings to a P.O. Box are not acceptable proof of residency. *Id.*

Young Adult Voters who do not have the required photo identification on Election Day and who are required to vote a provisional ballot will be required to navigate the bureaucratic maze of the IBMV and/or a board of health in Indiana or outside of the state within ten days of the election, and then go to

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[40] Satisfaction of this requirement may prove difficult even for younger voters who do have photo identification. In a nationwide survey of eligible voting-age citizens, 18% of citizens aged 18 to 24 years old did not have photo identification with their current address and name, which according to 2004 census figures amounts to almost 4.5 million citizens. Brennan Center for Justice at NYU School of Law, ***Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification,*** November 2006, ***available at*** http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf.

the county election board or circuit court clerk in order to present the acceptable identification if they were able to obtain it. This will entail yet further efforts by the voter, including for some taking time off from work or away from classes and the cost of traveling to the state office. A voter who is willing to swear that he is "indigent," and thereby avoid obtaining a photographic identification (if election officials agree that he or she is indigent) must still make this second trip to the election board or clerk's office in order to complete this affidavit. Ind. Code Ann. § 3-11.7-5-2.5 (West 2007).

In short, Indiana's voter identification requirements, as compared to other states that do not require additional identification to vote[41] or those states that accept a student photo identification,[42] whether or not it is state-issued and regardless of whether it bears an expiration date, to prove identity to vote, are particularly onerous for Young Adult Voters who otherwise meet all of the qualifications in Indiana to vote.[43] In view of the anomalous

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[41] *See* note 3 *supra*.

[42] Alabama, Alaska, Arkansas, Florida, Missouri and South Dakota. *See* Election Reform Information Project, *Voter ID Laws*, http://www.electionline.org/Default.aspx?tabid=364 (summarizing voter identification requirements in all states and District of Columbia) (last visited Nov. 1, 2007).

[43] The Georgia voter identification law, which also requires government-issued, unexpired identification, will likely have a similar oppressive effect on Young Adult Voters. A recent survey found that 34% of registered Georgia voters who may not have photo identification are 30 years old or younger. *No ID? Votes Cast Can Become Castoffs?*, Atlanta-Journal Constitution (Nov. 2, 2007). The effect on young minority voters will likely be even more severe since the same survey found that 46% of

complexity of the hurdles imposed by Indiana to voting by students and others, the lack of any demonstrated experience warranting such substantial hurdles, and the highly partisan legislative vote that imposed Indiana's law,[44] strict scrutiny is warranted, and necessarily results in invalidating Indiana's voter identification law.

CONCLUSION

For the reasons set forth above the judgment below should be reversed, and Indiana's voter identification law held unconstitutional.

Respectfully submitted,

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the registered voters who may not have satisfactory identification are African-American. *Id.*

[44] *See* Lesley Stedman Weidenbener, *Voter ID bill sent to Daniels; Law would be Nation's Toughest*, The Courier-Journal, Apr. 13, 2005, at 1A; Lesley Stedman Weidenbener, *House Passes Voter-ID Bill: Party-Line Vote Follows Heated Debate On Issue*, The Courier-Journal, March 22, 2005, at 1B.

AMICUS CURIAE BRIEF

Nos. 07-21 and 07-25

In The Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,
v.
MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,
v.
TODD ROKITA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS WILLIAM CRAWFORD, ET AL. [Impact on Voters' Privacy]

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QUESTION PRESENTED

Whether provisions of an Indiana state statute requiring voters to provide photo identification before they vote is unconstitutional on the grounds that it violates voters' rights under the First and Fourteenth Amendments?

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

One of the purposes of The Rutherford Institute is to work to preserve one of the most basic freedoms our Republic affords its citizens—the right to vote without intimidation or discrimination. We are also dedicated to preserving Americans' constitutional right to privacy, particularly in today's digital age.

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[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

STATEMENT OF FACTS

Respondent State of Indiana passed a voter identification law in 2005 that requires voters to produce a valid photo ID in order to vote. Indiana Public Law 109-2005. The law does not specify acceptable types of ID, but it does define the characteristics of an ID valid for voting purposes in IC 3-5-2-40.5. The ID must:

1. Display voter's photo.

2. Display voter's name, and the name must conform with the name on the voter registration record (conform does not mean match identically).

3. Contain an expiration date and either be current or have expired after November 7, 2006 (the date of the last General Election).

4. Be issued by the State of Indiana or the U.S. government.[2]

This requirement applies to all poll voters, with the exception of nursing home residents where a poll booth is located there.[3] The requirement does not apply to absentee ballots.[4]

Not all citizens of the State of Indiana currently have the identity documents that would be needed in order to vote.

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[2] *Available at* http://www.in.gov/sos/elections/hava/2007%20Media%20Kit/Photo%20ID%20fact%20sheet.pdf

[3] IC 3-11-8-25(e).

[4] IC 3-11-10-1.2.

SUMMARY OF ARGUMENT

This case has the potential to have a critical impact on the voting rights of all American citizens and the ease with which they can exercise their right to vote.[5] This case will have the greatest effect on minority groups, as they are the segments of society that are least likely to be able to comply with the requirements of the new law. This is because members of minority groups are less likely to have the ID required by the new law.[6]

There has been a long history of disenfranchisement in the United States, particularly of minorities. Since certain groups—primarily African-Americans—have had the legal right to vote, various methods have been used to disenfranchise them. Intimidation, literacy tests and the poll tax are among the most blatant methods that have been used in an attempt to circumvent the right of minorities to vote.

Present-day disenfranchisement has come through more subtle methods, such as voter caging, which has primarily been used to target minority residences.[7] Despite the success of the Voting Rights

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[5] While there is no explicit constitutional right to vote, this Court has recognized that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966). Additionally, U.S. Const. amends. XV, § 1; XIX; and XXIV, § 1 prohibit discrimination in voting on the grounds of race, sex and age respectively.

[6] *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

[7] *See* Justin Levitt and Andrew Allison, *Reported Instances of Voter Caging* (June 2007), *available at*

Act of 1965,[8] it would be naïve to think that attempts to disenfranchise groups in society do not still exist.

If the photo ID requirement is upheld, it would also open the door for the implementation of voter ID laws more restrictive than the State of Indiana's. The Commission on Federal Election Reform ("the Carter-Baker Report") recommends that states require "Real ID"[9] as the only acceptable form of voter identification. Enactment of this recommendation would place an even greater burden on voters than the Indiana law.[10] The success of Indiana's law would thus represent a first step in a trend of making voting more difficult, as the acceptability of drivers' licenses and even U.S. passports would disappear under the Carter-Baker Report's recommendation. Like Indiana's voter ID law, Real ID requirements would have a disproportionate burden on minority groups.

Moreover, as well as impacting on voting rights, photo ID in general—and Real ID in particular—presents significant privacy concerns. Photo identification often contains far more information than that necessary to comply with the voting requirements. For example, the Indiana driver's license contains the address of the holder,

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http://www.brennancenter.org/dynamic/subpages/download_file_19609.pdf.

[8] Pub. Law. No. 89-110; 79 Stat. 437 (1965).

[9] REAL ID Act, Div. B Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. Law. No. 109-13, 119 Stat. 231 (May 11, 2005).

[10] *Building Confidence in U.S. Elections*, §2.5, Report of the Commission on Federal Election Reform (September 2005), *available at* http://www.american.edu/ia/cfer/report/report.html#sect2_5.

information about the holder's height and weight, and the holder's driver's license number.[11] Some older licenses also contain the holder's Social Security number, as the prohibition on states displaying Social Security numbers on drivers' licenses only went into effect on December 17, 2005.[12] Disclosing sensitive information to a poll worker—a stranger—when showing the photo ID is a considerable breach of the voter's privacy. Furthermore, in an age when privacy rights are already being impacted upon by the regular requirement to identify oneself, the necessity to produce photo ID when engaging in a fundamental right represents another step toward a "show your papers" society.

Concerns already exist over the privacy of electronic voting machines,[13] but the fact that Real ID cards will be machine-readable creates an even greater concern as to whether sensitive information could be read from the ID if it is swiped at the polling station.

Other threats—legal and illegal—would be greatly enhanced by the introduction of the Real ID card. The vast database and biometric nature of the card would be open to abuse by the thousands of state and federal employees who have access to it. "Hacking" and "skimming" of our personal data

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[11] *See* example *at* http://www.indygov.org/NR/rdonlyres/998B3B85C-63AD-4DD4-B5BE-1602C9A33BDC/0/2007PhotoIDCardExamples.pdf.

[12] Intelligence Reform and Terrorism Prevention Act of 2004, § 7214, Pub. Law. No. 108-458; 118 Stat. 3638 (2004)

[13] *See* M. Keller, David Mertz, Joseph Lorenzo Hall and Arnold Urken, *Privacy Issues in an Electronic Voting Machine*, *available at* http://gnosis.cx/publish/voting/privacy-electronic-voting.pdf.

would be especially appealing to criminals—particularly in an age of electronic identity theft—given the completeness of the data stored on the database.

ARGUMENT

I. The State Of Indiana's Photo ID Requirement Creates A Ripe Potential For Breach Of Privacy, And This Potential Will Be Increased If Real ID Is Required To Vote.

The State of Indiana chose to turn a blind eye to the basic and fundamental right to vote and the right to privacy when it passed a law requiring citizens to produce photo ID in order to vote. This measure, which is purportedly designed to combat voter fraud,[11] undermines these basic rights and therefore should be struck down by this Court.

The requirement of the production of photo ID to vote has considerable privacy implications and represents the start of a slippery slope, particularly in light of the Carter-Baker Report's proposal that Real ID be the only acceptable form of identification for voting.

A. Privacy Concerns Today Over Voter ID

The necessity of providing photo ID at the polling station creates concerns about the individual's privacy. In particular, the individual

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[11] The State of Indiana has been unable to identify a single instance of in-person voter fraud having ever occurred in Indiana. *Crawford v. Marion County Election Bd.*, 484 F.3d 436, 439 (7th Cir. 2007).

does not solely disclose the absolutely necessary details—her name and proof of citizenship—when she produces her ID card. The most common form of photo ID is a driver's license, which, in Indiana, contains such sensitive information as the voter's driver's license number, date of birth, height and weight.[15] Some older licenses still contain the holder's Social Security number.[16] This information is not being given to law enforcement officials or government employees but to poll workers—many of whom may be volunteers for that day only—who have no right or need to know such information. The requirement that a voter give such sensitive information to a stranger places an undue hardship on the voter's exercise of her right to vote. Furthermore, there are many citizens who, for perfectly innocent reasons, don't want to divulge their personal information to strangers. Protected witnesses and abused wives hiding from their abusive husbands are two more obvious examples of such citizens. Women with protective orders are often exempt from the publicly available address requirements on voter registration lists, so having to show IDs that contain their addresses would be particularly burdensome on their right to vote.

Significant concerns already exist about the security and privacy of electronic voting machines. Every time a ballot is cast, the voting system adds an entry to one or more software or firmware logs that consists of a timestamp and an indication that a ballot was cast. If the timestamp log is combined with the contents of the ballot, this information becomes much more sensitive. For example, it can be

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[15] *Supra*, note 11.

[16] *Supra*, note 12.

combined with information about the order in which voters voted to compromise the confidentiality of the ballot. This information can be collected at the polling place using either overt or covert surveillance equipment, such as cell phone cameras or security cameras.[17]

Voting and privacy should, as much as possible, be mutually inclusive. Any requirement that impacts upon the secrecy of the ballot undermines the voting process. Indeed, the Fourth Circuit has advised against allowing statewide latitude in the use of personal information in elections. In *Greidinger v. Davis*, 988 F. 2d 1344, 1355 (4th Cir. 1993), the Fourth Circuit limited the scope of use of Social Security numbers in the administration of elections, holding that the publication of Social Security numbers created "an intolerable burden" on the right to vote.

Consequently, as the law stands today, there are considerable threats to the privacy rights of voters, which have been expanded by the necessity of requiring the voter to produce photo ID.

B. Privacy Concerns In Light Of The Commission on Federal Election Reform's Recommendations

In light of the Carter-Baker Report's recommendations for improvements to the electoral process, even more significant privacy concerns have arisen. One recommendation that the Commission proposed was that Real ID cards be the only form of identification acceptable in order for American

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[17] *Supra*, note 13, at 1.

citizens to vote.[18] Real ID cards are uniform, biometric identity cards linked to databases. The Real ID card would include a 2D barcode as its machine-readable technology, allowing information to be recovered from the database on production of the Real ID card.[19] The Federal Government mandates that states be given a time extension to replace drivers' licenses and photo ID cards with Real ID versions by December 31, 2009.[20]

Some of the privacy concerns about the impact of Real ID have already been debated in the Senate, where twelve senators urged that Real ID be kept off the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005. They believed that Real ID "places an unrealistic and unfunded burden on the state governments and erodes Americans' civil liberties and privacy rights."[21]

The requirement of producing photo ID raises concerns about the secrecy of the ballot, particularly considering the likelihood of Real ID becoming the only acceptable form of voter ID in the future if Indiana's law is upheld. Even if it is accepted that the need to prove one's identity and citizenship

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[18] *Supra*, note 10.

[19] *REAL ID Proposed Guidelines: Questions & Answers*, Department of Homeland Security, *available at* http://www.dhs.gov/xprevprot/laws/gc_1172767635686.shtm.

[20] *Id.*

[21] *Twelve Senators Urge Frist To Keep Real ID Act Off Supplemental Appropriations Bill*, Press Release, S. Comm. on Homeland Sec. & Governmental Affairs (Apr. 12, 2005), *available at* http://www.senate.gov/%7Egov_affairs/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=953&Month=4&Year=2005.

through documentation in order to vote is valid, information other than that could be communicated from the biometric nature of the card, especially if electronic voting machines are used. When information is provided by biometric cards, there is a possibility that data from them will be collected and used for purposes unknown to the voter. Therefore, this will reduce voter confidence in the system.

These concerns about government control over private information are not merely illusory or hypothetical, given recent government programs designed to collect private information. The Pentagon pays a private company to compile data on teenagers it can recruit to the military. Likewise, the Department of Homeland Security buys consumer information to help screen people at borders and detect immigration fraud.[22] Fifteen states were already linking drivers' licenses with school attendance and performance a decade ago.[23]

As such, certain behaviors are already being encouraged or discouraged by the government. The biometric nature of Real ID opens the possibility for a further increase in government agency monitoring of citizens' lives, as the network necessary to support Real ID would contain large amounts of private data in numerous areas of the lives of millions of citizens.

It will no longer be just the cowboy who sees the value in being able to move through life without an obligation to identify himself. Indeed, Real ID will

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[22] Arshad Mohammed and Sara Kehaulani Goo, "Government Increasingly Turning to Data Mining," *The Washington Post* (June 15, 2006). http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR2006061402063.html.

[23] Robert C. Johnston, "15 states link school status, student driving," *Education Week* (November 6, 1996), p. 1.

make regular identification of oneself a necessity. The value of not having to identify oneself when one has done nothing to warrant it is similar to the value not to be stopped and searched without probable cause. The move toward greater identification of a society's citizens represents a move toward a less free society. While showing a photo ID in order to vote might only seem like a minor burden on voters' rights, this could be substantial in the longer term. As Professor Daniel J. Steinbock has stated, identity documents have "an additional subjective effect on a grand scale: the psychic harm to free people of having to 'show your papers'... Not only would people forced to go through identity checkpoints experience some degree of fear and surprise, but also knowing that this has become a permanent part of the social fabric would diminish their sense of liberty."[24]

Eventual use of the Real ID card is not the sole privacy concern with voter ID. Once the data on a government database created through voter ID has been lawfully acquired, the data are the government's property. At this point, the government can do with it as it sees fit (unless there is a law or constitutional principle to the contrary). There are numerous risks to privacy from such a database, both legal and illegal. As the Electronic Privacy Information Center has pointed out, some of these problems have already manifested themselves, with some states experiencing problems of unauthorized parties accessing license and ID card

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[24] Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 740 (Sept. 2004).

data.[25] California,[26] Nebraska,[27] New Hampshire[28] and Texas,[29] for example, already have laws restricting the "skimming" of such data. The broad expansion of data collection and retention will create even greater risks, especially as there will be an increase in the number and type of documents retained in the database.

The Real ID system contemplates the consolidation of documents that are kept in a variety of places—the Social Security system, the immigration system, local courthouses, etc.—into

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[25] *Notice of Proposed Rulemaking: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, Comments of Electronic Privacy Information Center, p.22

[26] Confidentiality of Driver's License Information, California Civil Code 1798.90.1 (Effective January 1, 2004).

[27] Storage or Compilation of Information, Revised Statutes of Nebraska 60-4,111.01 (2001). The Nebraska law limits storage or compilation of information from the license or State identification card to the statutorily authorized purposes of the DMV, the courts or law enforcement agencies. Violation of the law is a felony.

[28] Drivers' Licenses Prohibitions, New Hampshire Revised Statutes, Title XXI, Motor Vehicles, Chapter 263, Section 263:12 (Effective January 1, 2003). The law prohibits scanning, recording or storing of the personal information obtained from the license unless authorized by the department. Non-electronic transfer of the information on the face of the license is prohibited without the consent of the license holder, except to law enforcement.

[29] Electronically Readable Information, Texas Statutes, Transportation Code, Title 7 Vehicles and Traffic, Chapter 521 Driver's Licenses and Certificates, Section 521.126 (Effective September 1, 2005). The law limits access to law enforcement, to identify a voter, to financial institutions for identification purposes and only with express consent, and upon authorization of a maritime facility, to secure the facility or port.

one national database.[30] This presents a huge incentive for abuse, from both authorized and unauthorized users.

Moreover, the list of security and privacy breaches of personal cards is huge. Recently, for example, almost 46 million credit and debit card numbers were stolen by hackers who accessed the computer systems at the TJX Companies over a period of several years. This made it the biggest breach of personal data ever reported.[31]

Considering such examples of widespread abuse of computerized data in the United States, the risk for abuse of Real ID cards and the accompanying database is therefore huge. A centralized database, such as that proposed by Real ID, would be a tempting target for identity thieves, which remains the number one concern of U.S. consumers, according to the Federal Trade Commission.[32] Identity cards are already being scanned for personal information by a variety of organizations that have no legitimate claim to this information. Bars and casinos, for example, have built up vast databases on their clients by surreptitiously skimming information from drivers' licenses.[33] Considering the volume of private

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[30] Real ID Act of 2005, § 202(d)(12); (d)(13).

[31] *Supra* note 25, at p.11, citing, TJX Cos., Annual Report (Form 10-K), at 8-10 (Mar. 28, 2007), *available at* http://ir.10kwizard.com/download.php?format=PDF&ipage=1772887&source=187.

[32] Fed. Trade Comm'n, *Consumer Fraud and Identity Theft Compliant Data: January – December 2006* (Feb. 7, 2007), http://www.consumer.gov/sentinel/pubs/Top10Fraud2006.pdf.

[33] *Bars, Casinos Swipe Personal Information from Drivers License*, thenewspaper.com, http://www.thenewspaper.com/news/11/1157.asp.

information that the Real ID card will hold, such privacy threats are of significant concern.

As well as the more obvious concern about unauthorized access is the risk that authorized users could abuse their power. A 2005 scandal in Florida highlights some of the risks associated with large database systems. There, a woman wrote to a newspaper criticizing a Florida sheriff as being too fat for police work and condemning his agency's use of stun guns. Orange County Sheriff Kevin Beary ordered staffers to use state driver's license records to find the home address of his critic. The sheriff sent her a letter at her home address, and she reported being surprised that he was able to track her down so easily.[34] Such potential for abuse is multiplied by a database that contains so much information and is accessible by thousands of state and federal employees.

Concerns about the abuse of biometric identity cards are not unique to the United States. The planned introduction of biometric ID cards in the United Kingdom has raised similar privacy concerns to those discussed. The Joint Committee on Human Rights ("JCHR") concluded that the interference in the private lives of citizens which would be brought about by an identity card would require a "pressing social need" and must not be achievable through less intrusive means.[35] The JCHR went on to express

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[34] *Supra*, note 25, p. 15, citing, "Called fat, sheriff tracks down reader," *Associated Press*, April 6, 2005.

[35] House of Lords House of Commons Joint Committee on Human Rights, *Scrutiny: Fourth Progress Report, Eighth Report of Session 2004 05* (March, 2005), http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/60/60.pdf.

particular concern that ID cards could build a "detailed picture of private life."[36]

As to the future of voting, serious questions arise as to why a biometric identity card is needed in order to vote. Why is the Carter-Baker Commission so adamant that this form of photographic identification be used, to the exclusion of even a passport? The Real ID card will be swiped and/or scanned, but will this be extended into the field of voting, allowing voting trends and patterns to be monitored by electronic voting machines? If Respondents are successful, there are very real dangers—or at least risks that have not been addressed—for the future of voting in the United States.

CONCLUSION

For the aforementioned reasons, the State of Indiana's photo identification requirement goes against the fundamental democratic principle of voter participation and represents a return to the disenfranchisement era of American politics. Furthermore, the attack on voters' privacy rights goes against a long American tradition of individual privacy. The Court should, therefore, affirm Petitioner's claim and reverse the Seventh Circuit's ruling.

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[36] House of Lords House of Commons Joint Committee on Human Rights, *Fifth Report* (29th November, 2004), at point 14, http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/35/3504.htm.

Date: November 13, 2007

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AMICUS CURIAE BRIEF

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Nos. 07-21, 07-25

In The
Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,

v.

TODD ROKITA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*, DORIS ANNE SADLER, IN SUPPORT OF STATE RESPONDENTS

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INTEREST OF *AMICUS CURIAE* [1]

From 2003 through 2006, *amicus curiae* Doris Anne Sadler was the duly elected Clerk of Marion County, Indiana. Marion County is the largest county in Indiana -- home to Indianapolis -- and in 2006 had an estimated population of about 865,500.[2] As Clerk, Ms. Sadler was responsible for administering elections in Marion County. Ms. Sadler oversaw those elections both before and after the enactment of Public Law 109-2005 (Indiana's "Voter ID Law"). As such, Ms. Sadler is qualified to explain the effects of the Voter ID Law on the conduct of local elections in the State. In particular, this brief will contrast the ineffectiveness of Indiana's former, in-person fraud prevention method (signature comparison) with the meaningful protection of voting rights afforded by the Voter ID Law.

SUMMARY OF ARGUMENT

The "prevention of [voter] fraud is a legitimate and compelling government goal." *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972). But, if the measures used to prevent that fraud are illusory, then so too is that goal.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* and her counsel contributed monetarily to the preparation or submission of this brief.

[2] *See* U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/states/18/18097.html (last visited Dec. 5, 2007).

Before Indiana enacted its Voter ID Law, poll workers had one tool at their disposal to combat fraud: a comparison of Election Day signatures to those previously entered in the voter registration rolls. Although minimally obtrusive, the effectiveness of signature comparisons as a barrier to fraud was equally negligible. Signature authentication is unquestionably a subjective, and unreliable, means of detecting fraud. Signatures naturally change due to age or other factors, and Indiana's volunteer poll workers have never had the qualifications necessary to conduct an accurate handwriting comparison in a matter of moments. Challenges based upon signature comparisons were inherently unworkable, and presented opportunities for potential manipulation of the process. Moreover, even when an individual's identity was legitimately challenged, that person could still vote, leave the polls, and never be found again. As a result of these issues, an individual's Election Day signature was nothing more than an oath that he or she was that registered voter. Unfortunately, as this Court noted in *Dunn*, "false swearing is no obstacle to one intent on fraud." *Id.* at 346.

For the maxim of "one person, one vote" to have meaning, States must be able to guard against "the diluting effect of illegal ballots." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). If one begins from the premise that signature comparison is inadequate for the task, then the question of whether States should be permitted to require a government-

issued photo ID is not at all difficult. Regardless of the standard of review this Court chooses to apply to the Voter ID Law, there simply is not a more narrowly tailored way of "ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (opinion of Blackmun, J.).

Finally, at its core, Indiana's Voter ID Law represents a political compromise, not a constitutional violation. Judge Posner correctly noted that, in this case, "the right to vote is on both sides of the ledger." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). By enacting the Voter ID Law, Indiana has taken legitimate steps to protect the value of legally registered votes. Doing so, the Petitioners contend, may make it more difficult for some theoretical group of voters to exercise their right. Every voting regulation invariably has some impact on some segment of the population of potential voters, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); yet, this Court has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Ultimately, it must be up to the Petitioners to demonstrate a constitutional violation as a matter of fact, not speculation. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring) (these important constitutional issues should "be resolved correctly on the basis of historical facts rather than speculation"). As the District Court found, the Petitioners presented only the latter. And, to date, the only empirical study of Indiana's Voter ID Law has

reached conclusions that directly undermine the speculative claims of Petitioners.

In sum, Indiana's Voter ID Law has provided a measure of integrity to elections that did not exist previously. In a time when voter confidence in the election process is demonstrably low, and vote margins increasingly slight, the security provided by Indiana's Voter ID Law far outweighs the theoretical inconveniences argued by the Petitioners. It should be upheld.

ARGUMENT

I. INDIANA'S SIGNATURE REQUIREMENT DID NOTHING TO PREVENT VOTE FRAUD.

In Marion County, Indiana, polling places are staffed by five officials: two clerks (one from each major political party), two judges (same), and one inspector (selected by the political party whose candidate for Secretary of State won the county in the last election). Ind. Code §§ 3-6-6-1, -2, -8 (LexisNexis 2007). Any of the five officials may challenge the qualifications of an individual to vote. Until recently, however, the only thing standing between the polls and someone intent on fraudulently voting was a signature.

Six years ago, an individual in Indiana could vote, leave the polling place, and have his or her vote counted automatically -- even if a poll official challenged that person's identity. If a challenge was made, the voter and poll official would both sign affidavits evidencing the challenge, but the voter was

still permitted to submit a ballot that counted. Although authorities could later investigate the challenged vote, the only evidence at their disposal would be the two affidavits and poll book signatures. Even if the vote could be proven fraudulent, there was no way to track down the offender, because the only address available to authorities was that of the legitimately registered voter in the poll book (if that person was still alive and at the same address). In 2002, Congress enacted the Help America Vote Act ("HAVA"). Pub. L. No. 107-252, 116 Stat. 1666 (2002). With HAVA came the widespread use in Indiana of provisional ballots, but the Act did not address the systemic problem of relying on signature verification as the only protection against fraud. And, because challenged votes were no longer automatically counted, implementing HAVA also increased the incentive for partisan challenges based on capricious signature comparisons.

Under either system, Indiana's procedures to guard against fraud were inherently arbitrary and demonstrably ineffective. Although federal courts routinely subject proffered handwriting-analysis testimony to scrutiny under Evidence Rule 702, *see, e.g.*, *United States v. Mornan*, 413 F.3d 372, 380 (3d Cir. 2005), Indiana's volunteer poll workers have been expected to make accurate handwriting comparisons, in a matter of moments, without any objective standards to apply.[3]

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[3] The Brief for Respondent Marion County Election Board provides on-line cites for its current poll-worker training slides. *See* Br. For Resp't Marion County Election Bd. at 4 n.3. Notably,

Election workers -- naturally hesitant to deny anyone a vote based on such an imperfect and subjective analysis -- saw little value in the signature comparisons. A challenge based upon a signature comparison might be unfounded because of a mere evolution in one's handwriting. As former Indiana State Senator Allie Craycraft explained to the *Ball State Daily News* in November 2007, "I registered to vote 75 years ago, and my signature has changed since then. If people are being refused the right to vote because of their signature not matching, they are being treated unfairly."[4]

Equally frustrating, Indiana's signature requirement provided no way to determine whether an individual was intent on defrauding the system because a signature, in itself, offered no verification of someone's identity. Nor was on-sight recognition of individuals ever a "time-tested system" of detecting fraud, as the Respondent Marion County Election Board's brief asserts. Br. of Resp't Marion County Election Bd. at 6. Belying the quaint notions of "neighborhood voting" described by the Election Board, *id.* at 4, Marion County, Indiana, has 630,993 voter

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not one of the presentations cited offers guidance on how to verify a voter's signature.

[4] Joe Cermak, *Prosecutor's Office To Determine Whether Signatures Were Valid*, Ball State Daily News (Muncie, Ind.), Nov. 7, 2007, available at http://media.www.bsudailynews.com/media/storage/paper849/news/2007/11/07/News/Prosecutors.Office.To.Determine.Whether.Signatures.Were.Valid-3084848.shtml.

registration records.[5] Spreading the votes of that many people across 914 precincts has proven to be a logistical nightmare, because there simply are not enough poll workers to staff every station. *Id.*; Brendan O'Shaughnessy, *City Wants To Reduce Precincts By '08 Elections; Fewer Polling Sites Will Help With Shortage Of Workers, Mayor Says*, The Indianapolis Star, Sept. 15, 2007, at 1. The notion that the poll workers who are available would recognize any consequential number of voters (or, more important, an imposter) on sight has no basis. Rather, before Indiana's Voter ID Law, Marion County voters (legitimate or not) merely signed in, cast their ballots, and left the polling p'ace never to be seen again. And, signature comparisons did nothing to help identify the presence of, or stop, any voter impersonation fraud, particularly in a highly populated urban area such as Marion County.

In *Dunn v. Blumstein*, this Court invalidated Tennessee's durational residence law, in part because there was no evidence "that durational requirements [were] in fact necessary to identify bona fide residents" and prevent voter fraud. 405 U.S. at 346. This Court stated that the durational requirement "add[ed] nothing . . . to stop fraud" because, in Tennessee, one's residence qualifications were established by an oath given when the individual registered to vote. *Id.* "Since false swearing is no obstacle to one intent on fraud," this Court reasoned, "the existence of burdensome

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[5] *See* Marion County Clerk's Office, *2007 General Election, Certified Results*, http://imcwwa2k3.indygov.org/elecnight/2007gen/.

voting qualifications like durational residence requirements [would not] prevent corrupt nonresidents from fraudulently registering and voting." *Id.*

Indiana's use of signatures as the only Election Day safeguard was similarly "no obstacle to one intent on fraud." Thus, the underlying question in this case is whether States may institute meaningful and minimally intrusive measures to guard against voter fraud, or forever retain such meaningless and arbitrary oath-swearing rituals.

II. INDIANA'S VOTER ID LAW PROVIDES MEANINGFUL PROTECTION AGAINST VOTE DILUTION AND DOES SO IN THE LEAST INTRUSIVE MANNER POSSIBLE.

In 2005, Indiana passed its Voter ID Law to address the significant concerns raised by the previous statutory regimes. The positive effects on Indiana elections were immediate. Poll officials acquired a meaningful tool to ascertain a voter's identity: a government-issued photo identification. Voters, too, immediately took to the new requirements. *Amicus* Sadler observed that most voters arrived at polls with ID in hand, ready to present it to poll officials. She received no complaints that producing a photo ID was intrusive in any way. And, she received no report of any individual unable to vote because he or she could not obtain the required identification or qualify for one of the law's several exemptions.

All of this was likely due to the extensive and thoughtful efforts of Indiana's state and county officials to educate the public regarding the law's

requirements. The Marion County Election Board's current position is that educating the public amounts to "encourag[ing] the notion that voting is difficult." Br. of Resp't Marion County Election Bd. at 13. That statement flies in the face of election officials' duties to inform the public any time an election regulation is enacted or changed. It also invites the question of how Petitioners would have responded had Indiana enacted its Voter ID Law but made no effort to inform the public of its requirements.

In any event, in 2005, Indiana's legislature finally took affirmative steps toward instilling confidence in an increasingly cynical electorate that every vote did, indeed, matter. And Indiana was not alone in this endeavor. In September 2005, the Commission on Federal Election Reform issued its bipartisan report recommending that all States require photo identification cards at polling places (the "Carter-Baker Report").[6] Though perhaps convenient to designate voter-identification laws as a Democrats-versus-Republicans issue, the Carter-Baker Report emphasized that voter confidence in elections is not a partisan issue. "Fraud in any degree and in any circumstance," the Report noted, "is subversive to the electoral process."[7]

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[6] Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections*, 21 (2005), http://www.american.edu/ia/cfer/report/full_report.pdf.

[7] *Id.* at 45. Locally, Indiana newspapers have echoed the same sentiment. For example, the Richmond (Ind.) *Palladium-Item* has editorialized, "Honest elections are not the province or platform of one party above another." Editorial, *A Bipartisan Case for Clean,*

This Court has similarly recognized that States have a "compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson*, 504 U.S. at 199. "The Court thus has 'upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). That interest in protecting the integrity of the electoral process is perhaps as compelling now as it has ever been.

Petitioner Indiana Democratic Party notes "Indiana's long standing history of razor thin election margins," and points out that "[t]hree 2006 Indiana House elections were subjected to recounts because only 7, 15, and 27 votes separated the leading candidates." Br. of Pet. Ind. Democratic Party at 19; *see also id.* at n.15 (collecting cases discussing narrow election margins in Indiana). In 2007, seven mayoral primaries in Indiana were decided by fewer than twenty votes.[8] Of course, narrow election margins are not exclusive to Indiana. In 2006, eighteen races for seats in the United States House of Representatives were decided by three percentage points or less; seven

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Fair Elections, Richmond Palladium-Item, Jan. 8, 2007, at A6. In that editorial board's opinion, the Seventh Circuit's decision in this case "offered a voice of reason amid the shrill noise." *Id.*

[8] *See* Secretary of State, *Indiana 2007 Mayoral Primary Results*, http://www.in.gov/apps/sos/primary/sos_primary07;jsessionid=uNwyKny9H3a596F8zr?page=office&countyID=-1&partyID=-1&officeID=32&districtID=-1&districtshortviewID=-1&candidate=.

of those by less than one percent.[9] Virginia's Senate race, in which 2,370,445 ballots were cast, was decided by less than half of one percentage point.[10]

The overriding concern must be what, if anything, States can do to ensure that such close elections are being decided legitimately. As this Court acknowledged in *Gray v. Sanders*, illegally cast ballots have the same "diluting effect" as improperly drawn geographical districts. 372 U.S. at 380. And, as the Carter-Baker Report explained, while "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting, . . . both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[11]

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[9] Connecticut's 2nd District was decided by 83 votes (out of 242,413 cast). Florida's 13th District was decided by 369 votes (out of 238,249 cast). Georgia's 12th District was decided by 864 votes (out of 142,438 cast). New Mexico's 1st District was decided by 861 votes (out of 211,111 cast). Ohio's 15th District was decided by 1,055 votes (out of 220,567 cast). Pennsylvania's 8th District was decided by 1,518 votes (out of 249,817 cast). And Wyoming's race was decided by 1,012 votes (out of 196,215 cast). Lorraine C. Miller, *Statistics of the Congressional Election of November 7, 2006* (2007), http://clerk.house.gov/member_info/electionInfo/2006election.pdf

[10] *Id.*

[11] Carter-Baker Report, *supra* note 6, at 18. The Report specifically cited Washington Governor Christine Gregoire's 129-vote victory in 2004 as exemplifying these concerns. After that election, the Report noted, "the elections superintendent of King

Depending on which standard of review this Court chooses to apply to Indiana's Voter ID Law, the issue could be stated in one of two ways: (1) whether there is a more narrowly tailored, or less drastic, method to ensure the integrity of Indiana's election process, *see Dunn*, 405 U.S. at 345; or (2) whether the State's interest in ensuring that integrity is generally sufficient enough to justify the law's requirements, *see Burdick*, 504 U.S. at 434. But whichever way one looks at it, the inescapable conclusion is that no regulation, short of a photo-identification requirement, provides for meaningful verifications of voters' identities.

Simply put, until it enacted its Voter ID Law, Indiana had no effective fraud-detection safeguards. The same cannot be said today. That is a development that should be celebrated, not reversed.

III. WITHOUT CONCRETE EVIDENCE OF A CONSTITUTIONAL VIOLATION, STATES SHOULD BE LEFT TO DETERMINE WHAT REGULATIONS ARE NECESSARY TO PROVIDE FOR FAIR AND HONEST ELECTIONS.

In the past, this Court has rejected the notion that election regulations could or should be deemed unconstitutional based only on speculation that they will adversely impact the plaintiffs. *See, e.g.*, *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972) ("Nothing in the record shows that appellants have

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County testified . . . that ineligible ex-felons had voted and that votes had been cast in the names of the dead." *Id.* at 4.

suffered any injury thus far, and the law's future effect remains wholly speculative."). In 2006, Justice Stevens' concurring opinion in *Purcell v. Gonzalez* noted that, "[g]iven the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation." 127 S. Ct. at 8 (Stevens, J., concurring). The Petitioners in this case, however, presented nothing more than speculation to the District Court, the Seventh Circuit, or this Court.

If this Court is to be guided by historical fact, rather than speculation, at least two resources are available: (1) Respondent Todd Rokita and *amicus* Sadler's hands-on experience administering Indiana election law; and (2) Professor Jeffrey Milyo's November 2007 study, "The Effects Of Photographic Identification On Voter Turnout In Indiana: A County-Level Analysis."[12] Professor Milyo's report -- the only empirical analysis of its kind specific to Indiana -- reaches conclusions diametrically opposed to the untethered theories advanced by Petitioners. Examining Indiana's 2002 and 2006 mid-term elections, Professor Milyo determined:

> Overall, voter turnout in Indiana increased about two percentage points from 2002 to 2006; however, in counties with greater percentages of

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[12] Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Inst. of Pub. Pol'y, Report 10-2007 (Nov. 2007), http://web.missouri.edu/~milyoj/files/IPP%20Report%20Corrected.pdf.

> minority or poor voters, turnout increased by even more, although this increase is not statistically significant. For counties with greater percentages of elderly or less educated voters, results are more mixed, but not consistently significant or negative. The only consistent and frequently significant effect of voter ID that I find is a positive effect on turnout in counties with a greater percentage of Democrat-leaning voters.[13]

By contrast, Petitioners have persistently claimed only that the Voter ID Law adversely affects some unidentified, hypothetical segment of the voting population. Setting aside academic, theoretical, and political arguments on all sides, this Court should not ignore the District Court's straightforward factual findings on this specific point. As Judge Barker stated, despite every incentive to do so, the Petitioners

> failed to submit: (1) evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote.

Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006).

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[13] *Id.* at 1.

In this Court, the Marion County Election Board also argues -- similarly, without any record support -- that voters are being turned away as a result of the Voter ID Law. As support, the Election Board states that thirty-two of thirty-four voters in Marion County who cast provisional ballots in the 2007 municipal election did not return with photo ID within ten days. Br. of Resp't Marion County Election Bd. at 8-9. But what is this Court to make of that? The Election Board's "evidence" that the Voter ID Law "has deprived otherwise-qualified persons from exercising their right to vote," *id.* at 13, should be put into context, if accepted at all.

There are 630,993 voter registration records in Marion County.[14] The 2007 election for Indianapolis' next mayor brought 165,002 of those registered voters to the polls, and the race was decided by 5,312 votes.[15] The night of the election, incumbent Mayor Bart Peterson conceded to challenger Greg Ballard. Mary Beth Schneider, *Ballard Stuns Peterson*, The Indianapolis Star, Nov. 7, 2007, at 1. It is likely that, in this context, the thirty-two voters cited by the Election Board made a simple cost-benefit analysis and decided not to return and verify their identities. Thus, any effect on those thirty-two votes -- which would have accounted for less than two hundredths of a percent of all Election Day votes in Marion County -- was not a product of the Voter ID Law, but rather the

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[14] *See* Marion County Clerk's Office, *supra* note 5.

[15] *Id.* Nor was any race for the City-County Council decided by a margin that would have been affected by thirty-two additional votes. *Id.*

likely product of voter choice. Alternatively, it may well be that some of those thirty-two voters were not who they claimed to be. In that case, the Voter ID Law *would have done its job* by preventing fraudulent votes from being counted, and it cannot seriously be argued that the Voter ID Law should be stricken because it works.

From the perspective of *amicus* Sadler -- who once had to remedy an Election Day issue of thousands of voters wrongly purged from the rolls by Marion County's Voter Registration Board -- a matter of thirty-two people deciding not to verify provisional ballots in a settled contest was hardly the cataclysm predicted by Petitioners. If historical fact, not speculative rhetoric, is indeed this Court's guide, then the judgments of each court to have evaluated (and flatly rejected) Petitioners' claims should be affirmed.

Failing their own burden, Petitioners' fingers have necessarily pointed outward, claiming that the State is unable to prove a need for the Voter ID Law. First, Petitioners state that the Respondents did not produce historical evidence of prosecutions for voter impersonation fraud; therefore, they contend, criminalizing voter fraud is sufficient to deter it. In like manner, Petitioners assert that if signature comparisons are good enough to determine the validity of absentee ballots, then they must necessarily be good enough to prevent in-person voting fraud. These arguments amount to little more than a pair of non sequiturs.

Initially, the mere absence of prosecutions for voter impersonation fraud is not the same as evidence that

no such fraud has taken place. Indeed, in *Burson v. Freeman*, a plurality of this Court rejected the argument that statutes criminalizing voter intimidation were an effective substitute for regulations establishing restricted zones around polling places. 504 U.S. at 206-07. Those criminal statutes, the Court said, fell "short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)). Similarly, statutes criminalizing voter impersonation fraud are necessarily ineffective when enforcement depends upon a method (signature comparisons) that provides no meaningful way to determine whether a voter is falsely identifying himself. At bottom, Petitioners' argument is not just that "there is absolutely no evidence of voter-impersonation fraud in Indiana," Br. of Pet. Ind. Democratic Party at 43, but also that Indiana should take no meaningful steps to look for it. That argument is simply a variation on a theme already rejected by this Court. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (legislatures should "be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively").

Separately, Petitioners contend that because Indiana uses signature comparisons for absentee ballots, those comparisons must necessarily be good enough to prevent voter fraud in all circumstances. Such a one-size-fits-all approach, however, is incompatible with the realities of election administration and ignores the substantial difference between in-person and absentee voting. For example, there is no possible benefit to having someone copy

their photo ID then mail it in with their absentee ballot. To what would an election official compare the photo? Moreover, the vast majority of votes are cast in person, not by mail. Thus, the safeguards provided by the Voter ID Law apply to the greatest number of votes possible, while leaving open the option of absentee voting to those who need it. And, just because the legislature has not eliminated the use of signature comparisons in absentee voting does not mean it must wait to address the security of in-person voting. *Cf. McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (internal quotations omitted). Accepting Petitioners' position would be tantamount to imposing a Hobson's choice on every State considering additional safeguards for its elections: address all potential sources of fraud at once, and in the same manner, or do nothing at all.

If anything, the diverse views regarding the wisdom of voter-identification laws such as Indiana's reveals that the issue is a "difficult problem[] of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000). In such a case, this Court has an "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions" to those problems. *Id.*; *see also Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982) ("We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court."); *Sailors v. Bd.*

of Educ., 387 U.S. 105, 111 (1967) ("We see nothing in the Constitution to prevent experimentation."); *cf. New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The goals in administering an election are straightforward: 100-percent turnout, no fraud, and complete confidence that every vote cast is worth the same as the next. Realistically, those goals may never be achieved. But they most assuredly will not be if States must remain tied to the election methodology utilized for generations. As new technologies emerge, and existing technologies advance, States will necessarily examine the utility of those technologies in improving the election process. For example, Indiana is currently studying the merit of centralized voting centers as a way to conduct elections more efficiently (which would increase voters' access to the ballot while also increasing the need for photo ID).[16] Such innovation will come to a halt if States must face litigation based solely on knee-jerk, speculative claims at every turn.

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[16] *See* Andrea Neal, Editorial, *A Tale Of 2 Cities' Elections*, The Indianapolis Star, May 17, 2007, at 14 (describing effective use of voting centers in State pilot project).

In sum, States must be given latitude to experiment in the conduct of their elections, including the means by which the integrity of those elections is ensured. Although such experimentation must surely take place within a constitutionally designed laboratory, disagreement with legislative judgments is not equivalent to constitutional infirmity. While Petitioners might opt to implement different safeguards against in-person voter fraud, or no safeguards at all, that does not make the Voter ID Law invalid.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,

Petitioners,

v.

TODD ROKITA, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE DR. FREDERIC C. SCHAFFER, DR. LOUIS MASSICOTTE, DR. JØRGEN ELKLIT, DR. TOBY MOORE, AND DR. GRAEME ORR IN SUPPORT OF PETITIONERS [INTERNATIONAL VOTER ID LAWS]

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INTEREST OF AMICI CURIAE

Amici curiae are scholars who study the administration of elections, both in the United States and abroad. *Amici* offer this brief to explain why the international experience with voter identification laws is not instructive in determining the constitutionality of Indiana's photo identification requirement.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have filed letters with the Clerk of the Court consenting to the filing of any *amicus curiae* brief.

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[2] *Amici curiae's* affiliations are listed for identification purposes only.

SUMMARY OF ARGUMENT

The international experience with voter identification laws is not instructive in evaluating the constitutionality of Indiana's voter identification law. Fundamental differences in the structure of the electoral systems, the voter identification requirements, the availability of voter identification, and jurisdictions' historical experiences with voter fraud prevent an effective comparison between Indiana and other countries. Moreover, little research exists on the key issue before the Court—whether countries' voter identification requirements result in vote suppression—and available research suggests voter identification laws can disenfranchise eligible voters.

American proponents of stricter voter identification laws have frequently invoked the international experience with voter identification to support their cause. Contrary to their assertions, however, no international consensus exists that voters should be compelled to show photo identification before being allowed to vote. Indeed, established democracies such as the United Kingdom and Australia do not require voters to show identification.

The experience of those countries that do require identification provides little or no insight into whether Indiana's law burdens the exercise of the franchise. Other countries' voter identification laws provide for more flexibility in the types of identification permitted, greater access to identification, and less restrictive alternatives to identification than those found in Indiana's statute. Even if these differences could be ignored, the voter suppression effects of other countries' voter identification laws have not been sufficiently studied.

Moreover, voter identification laws in countries such as Mexico were adopted in response to a societal consensus, which does not exist in Indiana, that voter fraud was prevalent and threatened the legitimacy of electoral outcomes.

In short, *amici curiae* urge the Court to carefully scrutinize claims by defenders of Indiana's law that foreign models support the constitutionality of the Indiana photo identification requirement.

ARGUMENT

I. MANY OTHER ESTABLISHED DEMOCRACIES DO NOT REQUIRE PHOTO IDENTIFICATION.

The vast majority of American states conduct elections without requiring photographic identification[3] and with little to no evidence of in-person voter impersonation fraud. Proponents of photo identification laws have therefore attempted to shift attention to the experience of other countries. One advocate for voter identification has rhetorically asked, "If ID cards threaten democracy, why does almost every democracy except us require them, and why are their elections conducted better than ours?" Robert Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, THE AMERICAN PROSPECT 16.1 at A2 (Jan. 2005). *See also* COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS at 5, 20 (Sept. 19, 2005) (stating that voters in many other democracies use a photo identification card). *But see* BRENNAN CENTER FOR JUSTICE, RESPONSE TO THE REPORT OF THE 2005

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[3] Electionline.org, *available at* http://www.electionline.org/Default.aspx?tabid=364 (Updated Sept. 26, 2006).

COMMISSION ON FEDERAL ELECTION REFORM at 14-15 (2005) (discussing flaws in Commission's analysis of other nations' voter identification laws).

But some of our closest democratic allies do *not* impose photo identification requirements on their electorates. Jurisdictions that allow their citizens to vote without showing photo identification include the United Kingdom (excluding Northern Ireland), Australia, Ireland, Denmark, and New Zealand, as well as nearly all U.S. states. LOUIS MASSICOTTE, ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES, Table 5.1 (University of Toronto Press 2004); Commonwealth Electoral Act (Australia), Part XVI § 229; THE ELECTORAL COMMISSION OF THE UNITED KINGDOM, SECURING THE VOTE: REPORT AND RECOMMENDATIONS at 29 (May 2005). Indeed, as scholars of comparative election laws have noted, "established democracies are less likely [than other democracies] to require voters to identify themselves other than verbally." MASSICOTTE, ET AL., *supra*, at 122.

In short, many established democracies do not require voters to show photo identification. And, as explained below, those countries that do require identification generally have more flexible identification requirements, have more readily available identification, and provide alternatives to identification that are less restrictive than those contained in Indiana's identification law.

II. LACK OF RESEARCH AND VARIATION IN VOTER IDENTIFICATION LAWS COMPLICATE ATTEMPTS TO DRAW CONCLUSIONS ABOUT INDIANA FROM THE EXPERIENCES OF FOREIGN JURISDICTIONS.

That some foreign jurisdictions have imposed voter identification requirements is the beginning of any

comparative analysis, not the end. The constitutionality of Indiana's law fundamentally depends on facts specific to Indiana—*i.e.*, Indiana's history of in-person voter impersonation fraud, if any, and the degree to which Indiana's unique voter identification requirement will disenfranchise voters. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (determining the constitutionality of an election regulation is "very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.") Available research does not show that other countries' identification laws are sufficiently similar to Indiana's to provide an effective comparison, and it does not comprehensively address the effects of foreign laws on voter participation rates.

A. No study has systematically examined the types of identification laws that foreign jurisdictions have adopted.

Not enough is known about the *types* of voter identification requirements in foreign jurisdictions. A leading study that examined whether 63 countries had voter identification laws limited its description of whether an "identification document [was] required" to "yes," "no," or "[i]n some cases only." *See* MASSICOTTE, ET AL., *supra*, at Table 5.1. The study's authors did not explain whether the required identification was photographic, how the identification was disseminated, or whether there were alternatives available to a voter who appeared at the polls lacking valid identification.

Voter identification proponents have also drawn unsupported inferences from a website that lists countries with national identification cards. *See* Privacy.org, "Identity Cards: FAQ," http://www.privacy.org/pi/activities/idcard/idcard_faq.html. Notwithstanding that website's acknowledgement that countries establish identification card systems "for a variety of reasons," mostly unrelated to elections, proponents of voter identification have cited the website for the proposition that "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS at 5 (Sept. 19, 2005). The cited website says nothing, however, about whether photo identification cards are required at elections, much less whether such cards result in disenfranchisement of registered voters or were adopted due to a significant history of voter fraud.

B. Differences in voter identification laws may prevent valid comparisons.

Although no study has comprehensively examined the types of voter identification laws that exist in other countries, there is reason to believe that the specifics of these foreign requirements are not comparable to those found in Indiana's statutes. Indiana's strict voter identification law requires photo identification in all Indiana elections and from all voters, setting aside limited exemptions for the indigent, residents of state-licensed care facilities, and religious objectors. IND. CODE §§ 3-5-2-40.5, 3-11-8-25.1. Non-exempt voters lacking photo identification on the day of election face the added burden of obtaining photo identification within 10 days and making a second trip to complete the voting process, this time to the circuit court clerk or county

election board. IND. CODE §§ 3-11.7-5-1, 3-11.7-5-2.5. Likewise, indigent voters and religious objectors must make a separate trip to the court clerk or county board to exercise their exemption. IND. CODE § 3-11.7-5-2.5. To our knowledge, no research has been done on the disenfranchising effects of a similar voter identification law in another country.

Indeed, the voter identification laws in other countries of which *amici* are aware differ significantly from the Indiana law. In Sweden, for example, the voter identification requirement does not mandate photo identification. It instead provides that "[a] voter who is not known to the voting clerks shall produce an identity document or in another way verify her or his identity." Elections Act (Sweden) 2005, c. 8, sec. 6. Germany requires identification only when the voter does not have a polling notice or when the voter attempts to cast a ballot outside of his or her registered district. MASSICOTTE, ET AL., *supra*, at 121-22. Communities of 5,000 people or less are exempt from France's voter identification law. C. Electoral (France) art. R 60. And Canada's recently-passed law has fall-back provisions that allow voters lacking photo identification to present two forms of non-photo identification or to have a fellow voter vouch for their identity. An Act to Amend the Canada Elections Act and the Public Service Employment Act, Bill C-31, Clause 21.

In other countries, the rules for what constitutes valid identification can be so complex that no reasonable comparison could be drawn between Indiana's law and that of the foreign jurisdiction. In India, ration cards that are issued on or before January 31, 2007 can be used as identification, but only for the head of the family and a spouse or unmarried daughters who accompany the head of the

family to the polling station. *See* Election Commission of India, Order No. 3/4/ID/2007-JS-II (Apr. 4, 2007). India also allows the use of property documents, Kisan-Bahi (a farmer's card) with photograph, pension documents, Freedom Fighter Identity Cards, Arms Licenses, and more to satisfy voter identification requirements. *See* Election Commission of India, Order No. 3/4/ID/2007/J.S.II/(UP) (March 31, 2007).

C. Differences in the availability of identification also undermine comparisons between Indiana and foreign jurisdictions.

Even if the specifics of Indiana's law were sufficiently similar to a foreign country's, voters in the two jurisdictions would also need to have similar levels of access to the required forms of identification in order for an effective comparison to be made—where more people have acceptable identification or can easily obtain it, fewer people will be prevented from voting due to an identification requirement. Again, while no systematic research has compared the availability of identification in nations' voter identification requirements, access levels likely differ significantly from jurisdiction to jurisdiction.

Indiana does not routinely provide free identification to all registered voters. Rather, Indiana places the burden on voters lacking required photo identification to present a birth certificate, a report of birth, or a naturalization certificate *plus* another form of identification, at least one of which must state the voter's residential address, to the Bureau of Motor Vehicles ("BMV") in order to obtain a voter identification card. For those non-indigent voters who have to obtain a birth certificate or other

identification to present to the BMV, Indiana's form of free voter identification is not really free at all.

In contrast, other jurisdictions such as Sweden and Northern Ireland base their voter identification systems on free and widely available voter cards. Elections Act (Sweden) 2005, c. 5, sec. 8; THE ELECTORAL COMMISSION OF THE UNITED KINGDOM, RESEARCH REPORT: THE ELECTORAL FRAUD (NORTHERN IRELAND) ACT 2002: AN ASSESSMENT OF ITS FIRST YEAR IN OPERATION at 21 (2003) (hereinafter "ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND"). In Sweden, the Central Election Authority mails out free voting cards to every person with a known address who is listed on the voting roll, which includes everyone in Sweden's population registration database and land register. Moreover, a Swedish voter can obtain a duplicate voting card simply by providing his or her name and personal identity number. Elections Act (Sweden) 2005, c. 5, sec. 1, 8-10. In Northern Ireland, a voter can obtain a free electoral identity card merely by filling out an application form with the voter's name, postal address, date of birth and national insurance number. If the voter does not have a national insurance number, the voter can instead submit a declaration that they never had a national insurance number. ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND at 26.

In short, differences in levels of access to required identification further inhibit useful comparisons between the Indiana law and voter identification requirements in foreign jurisdictions.

D. Differences in related electoral rules undermine comparisons between Indiana and foreign jurisdictions.

Any useful comparison of two jurisdictions' voter identification laws would also have to take into account other laws that impact voter participation rates. For example, while Belgium requires voter identification, it also makes voting compulsory and provides its citizens with national identity cards beginning at age 12. C. Electoral (Belgium), Titre VI, art. 207-210; Danny DeCock, Christopher Wolf and Bart Preneel, The Belgian Electronic Identity Card (Overview), *available at* http://www.cosic.esat.kuleuven.be/publications/article-769.pdf. Thus, high voter participation rates in Belgium would provide no evidence of the disenfranchisement effects of Indiana's law.

E. The disenfranchisement effects of international voter identification laws have not been sufficiently analyzed.

Regardless of whether the differences between Indiana's law and the voter identification policies of foreign jurisdictions could be reconciled, there is little available research on the vote suppression effects of identification laws in these foreign jurisdictions.

The limited research that has been conducted, moreover, suggests that voter identification requirements can suppress voter participation rates. A study conducted of the voter identification requirements implemented in Northern Ireland in 2002 concluded that "a number of disadvantaged groups were less likely to have identification." ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND at 7. The process to obtain a valid identity card was less costly and far simpler than the process

of obtaining photo identification in Indiana. The Northern Ireland card is free and all that the voter has to do is return one application in a pre-paid envelope. *Id.* at 26. Yet even this easy, free process prevented some voters from obtaining proper identification. One in five applications for the identity card were initially rejected due to incorrect information, and no data has been collected on whether rejected applicants reapplied.

Furthermore, awareness of the identification requirement varied among groups in Northern Ireland. Young adults, students, renters and the disabled showed a lower than average awareness that photo identification was required. For example, only 40% of voters under the age of 24 knew of the requirement. *Id.* at 64. Voters in lower socio-economic brackets were also less likely to know about the photo identification requirement. *Id.* Survey research found that 5 percent of those surveyed would have brought an incorrect form of identification to the polls, and 7 percent did not actually possess a valid form of identification. *Id.* at 64. Among registered voters, 3 percent lacked identification and had not applied for a voter identity card. The numbers were significantly worse for voters in the lowest socio-economic bracket (12%), the disabled (12%), and young adults (13%). In other words, "a significant proportion of people" lacked "the necessary identification" to vote. *Id* at 65.

III. THE PREVALENCE AND CHARACTER OF VOTER FRAUD IN OTHER COUNTRIES IS NOT COMPARABLE TO VOTER FRAUD IN INDIANA.

Voter identification is often a response to a societal consensus that fraud threatens the democratic system of governance. Because of this, democracies

with a recent history of voter fraud are more likely to have photo identification requirements than other democracies. MASSICOTTE, ET AL, *supra* at 122. *See also* Michael Maley, *Transplanting Election Regulation*, 2 ELECTION L.J. 479, 491 (2003) (noting the differences in rates of electoral fraud between established democracies and emerging democracies).

Proponents of voter identification often look to Mexico's experience with voter identification. *See* George W. Grayson, *Registering and Identifying Voters: What the United States Can Learn from Mexico*, 3 ELECTION L.J. 513 (2004); Robert A. Pastor, *What the U.S. Could Learn From Mexico*, L.A. TIMES (July 8, 2006). But as the head administrator for Mexico's electoral agency explained, "all electoral processes are different and their complexity is directly related to their own history, as well as to their specific social and political context." Jose Woldenberg Karakowsky, *Lessons from Mexico*, 12 J. OF DEMOCRACY 151, 151-52 (2001). It is difficult to draw any lessons from the Mexican experience because "Mexico's complex system must be understood as a response to the historical unreliability of [its] electoral processes"—that is, to its history of widespread electoral fraud. *Id.*

Similarly, widespread concern over voter fraud provided the impetus for Northern Ireland's voter identification requirements. As one study explained, there was a consensus in Northern Ireland that electoral fraud had "been a significant factor in the electoral landscape of Northern Ireland for many decades." ELECTORAL COMMISSION REPORT ON NORTHERN IRELAND at 3. Rather than being a partisan issue, "[t]he existence of electoral fraud [in Northern Ireland] is acknowledged on all sides of the

political divide although its scale and level of intensity remain unknown." *Id.* at 15.

In contrast to Northern Ireland, the "level of trust and goodwill" in the electoral process experienced in the rest of the United Kingdom has resulted in "voters . . . not [being] required to produce any form of identification." THE ELECTORAL COMMISSION OF THE UNITED KINGDOM, SECURING THE VOTE: REPORT AND RECOMMENDATIONS at 29 (May 2005).

The lack of any evidence or consensus that in-person voter fraud has occurred in Indiana further differentiates the state from jurisdictions such as Northern Ireland and Mexico. *See Crawford v. Marion County Election Board*, 472 F.2d 949, 953 (7th Cir. 2007). The record before the Court contains no evidence of in-person, voter impersonation fraud in Indiana. Neither the State of Indiana nor its supporters can justify the Indiana photo identification requirement based on jurisdictions whose electoral histories and circumstances differ so significantly from Indiana's.

CONCLUSION

In short, the Court should carefully examine any claim that Indiana's photo identification requirement is justified by the international experience with voter identification laws. Photo identification is not universally required, particularly among well-established Western democracies. Where voter identification is required, the particulars differ significantly from Indiana's law. Moreover, the incidence of vote suppression in those countries that require photo identification has not been adequately examined, and the limited research that has been conducted suggests that there is reason to be concerned about the disenfranchising effects of

identification requirements. The constitutionality of Indiana's law should turn not on poorly-supported comparisons to other countries, but on a careful examination of the specifics of Indiana's law, its vote suppression effects, and the prevalence of fraud in that jurisdiction.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,
v.
MARION COUNTY ELECTION BOARD, ET AL.,
Respondents.

INDIANA DEMOCRATIC PARTY, ET AL.,
Petitioners,
v.
TODD ROKITA, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF TEXAS, ALABAMA, COLORADO, FLORIDA, HAWAII, MICHIGAN, NEBRASKA, PUERTO RICO, AND SOUTH DAKOTA AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici States have a compelling interest in safeguarding the integrity of democratic elections. *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). All 50 States, the District of Columbia, and Puerto Rico have enacted laws concerning voter qualifications, ballot security, and voter fraud. Indiana's photo-ID statute reflects that tradition, ensuring that every qualified voter's vote counts and that those votes are not diluted by illegal votes cast by others.

Voter fraud undermines respect for democracy and public confidence in the electoral process. *Amici* States have a strong interest—indeed, an obligation—to combat voter fraud and to protect the fundamental right to vote for every citizen.

SUMMARY OF THE ARGUMENT

Voter fraud is a serious concern, and Congress and every State in the Union have legislated to address it. The bipartisan Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker, expressly urged that States require photo IDs for voting, and several States, including Indiana, have followed that recommendation.

Requiring a photo ID to vote serves important government interests. It protects the integrity of elections, promotes confidence in the democratic process, and avoids diluting the votes of legal voters. And the burden on voters is slight. In our modern age, photo IDs are required for the most mundane activities, from driving a car to entering a government building to renting a DVD. As recommended by the Carter-Baker Commission, Indiana has provided photo IDs *without cost*, and so the burden of securing one is minimal.

Under longstanding precedent, the States have substantial leeway to balance competing policy interests, and Indiana has implemented a commonsense measure to prevent fraud in democratic elections. Nothing in the Constitution prohibits this law.

ARGUMENT

I. VOTER FRAUD IS A SERIOUS CONCERN.

The foundation of Petitioners' challenge is the notion that voter fraud, and in particular in-person voter fraud, is not a very serious problem. They urge that "the record is . . . bereft of evidence suggesting any fraud problem," and that Indiana in particular lacks "any reasonable basis to suspect that such fraud is a risk in Indiana." Pet'r Br. (07-021), at 46-47, 54. Petitioners are incorrect.

At the most general level, the falsity of Petitioners' position is easily demonstrated. Voter fraud is a serious problem. Just last Term, the Court explained,

> "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. *Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.* Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. '[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Purcell* v. *Gonzalez*, 127 S.Ct. 5, 7 (2006) (per curiam) (emphasis added) (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)).

Indeed, the threat of voter fraud is sufficiently pronounced that the Carter-Baker Commission was

convened to carefully study the issues and to make recommendations. That Commission, in turn, issued a final report in 2005 entitled "*Building Confidence in U.S. Elections*." The bipartisan report began,

> "[e]lections are at the heart of democracy . . . . *Americans are losing confidence in the fairness of elections*, and while we do not face a crisis today, we need to address the problems of our electoral system . . . ." REPORT OF NAT'L COMM'N ON FED. ELECTION REFORM: BUILDING CONFIDENCE IN U.S. ELECTIONS, at ii (2005) [CARTER-BAKER COMM'N REP.].

A. The History of Our Nation Demonstrates the Ongoing Threat of Voter Fraud.

From New York's Tammany Hall to the Kansas City Pendergast machine, from Alice, Texas and the 1948 Senate race between Lyndon B. Johnson and Coke Stevenson to Mayor Richard Daley's Chicago machine in the 1960 presidential race, the specter of voter fraud has threatened the integrity of the electoral process for the entire history of our Nation. And that threat continues to this day. *See, e.g.*, TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004, at xvi-xvii (2005) [CAMPBELL, ELECTION FRAUD] (noting that the American political process has been "deeply corrupted . . . for over two hundred years" and that voting fraud "is a deeply embedded culture within American politics that considers cheating fully justifiable"); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 276 (1996) ("Our nation has a long and depressing history as a happy haven for the vote thief."); Steven F. Huefner, *Remedying*

Election Wrongs, 44 HARV. J. ON LEGIS. 265, 271 (2007) ("Voting fraud of course is a long-standing plague on democratic elections.").

Recent notorious instances of alleged voting fraud include the 1996 Dornan-Sanchez congressional race for California's 46th District, in which investigators turned up evidence of at least 784 illegal votes cast by noncitizens, *see* Hearing on Non-Citizen Voting Before the Comm. on House Admin., 109th Cong. 2 (2006) (testimony of Dan Stein); the 2000 Miami mayor's race between Joe Carollo and Xavier Suarez involving tainted absentee ballots, CAMPBELL, ELECTION FRAUD, at 286-91; and the 2004 Washington gubernatorial race, where a state judge determined that 1,678 votes had been illegally cast, *see* CARTER-BAKER COMM'N REP., at 4. In addition, since October 2002 the U.S. Department of Justice has launched more than 180 investigations into election fraud that have resulted in charges against 89 individuals and 52 convictions. *Id.*, at 45. These events serve as sad reminders that voting fraud is a real and persistent part of American politics and that, even assuming that voting fraud is not as widespread as it was in decades past, it can still affect the outcome of a close election. *Id.*, at 18.

Petitioners' claim that voting fraud is largely chimerical is belied by the facts. For example, for decades, the State of Texas has grappled with the challenges of voting fraud. Lyndon B. Johnson's 1946 Senate campaign is only the most infamous instance, but serious allegations of voter fraud have persisted, especially in South Texas, for more than a century.

Over the past five years, the Texas Attorney General's Office has vigorously enforced the voter-fraud laws, and

has obtained numerous indictments, guilty pleas, and convictions. In one case, a city councilwoman was convicted and sentenced to five years in prison for registering noncitizens to vote and then facilitating noncitizen voting by tampering with government documents. *See Former Port Lavaca Councilwoman Briseno to Serve Five Years in Prison for Voter Fraud*, June 25, 2007, http://www.freerepublic.com/focus/f-news/1856131/posts. Another instance of voter fraud involved allegations that a woman escorted voters into polling sites and illegally marked ballots without their consent. *See* Mary Ann Cavazos, *Robstown Woman Indicted and Jailed in Voter-Fraud Case*, CALLER-TIMES, June 16, 2006, http://www.caller.com/ccct/local_news/article/0,1641,CCCT_811_4779588,00.html. In yet another case, a man was indicted for double voting in the November 2006 general election. *See Five Rio Grande Valley Residents Indicted for Voter Fraud Allegedly from 2006 Election Cycle*, June 1, 2007, http://www.edinburgpolitics.com/?p=82. There was also a Refugio County Commissioner who pled guilty to the felony of tampering with government documents during a primary election, an East Texas former State Senator who was indicted for official oppression in trying to keep two candidates for a water board off the ballot, and a Beeville, Texas resident who pleaded guilty to casting ballots for her deceased mother. And many more instances of voting fraud relating to the illegal possession, handling, and transport of mail-in ballots have occurred. *See, e.g., Refugio County Commissioner Pleads Guilty to Election Fraud Scheme*, Oct. 9, 2007, http://www.setexasrecord.com/news/202316-refugio-county-commissioner-pleads-guilty-to-election-fraud-scheme; *Nueces County Indictment in Voter Fraud Investigation*, ASSOC. PRESS, Jan. 19, 2007, http://www.kristv.com/

global/story.asp?s=4263338; *Reeves County Woman Convicted for Voter Fraud*, June 28, 2006, http://www.brackettville.info/modules/news/article.php?storyid=1186; *Commissioner Given Probation for Voting Fraud*, Nov. 10, 2005, ASSOC. PRESS, http://abclocal.go.com/ktrk/story?section=state&id=3622674.

B. Voter Impersonation at the Polls Is Likewise a Serious Threat to the Integrity of Our Electoral Process.

Petitioners could be heard to answer, no doubt, that while voter fraud writ large might perhaps be a problem, the specific problem of fraudulent voting at the polls—which photo-ID laws seek to prevent—is not at all significant. Again, Petitioners are incorrect.

Although the precise magnitude of voter-impersonation fraud has been disputed, "there is no doubt that it occurs." *See* CARTER-BAKER COMM'N REP., at 18. For example, witnesses who testified during the last Regular Session of the Texas Legislature on proposed photo-ID legislation reported that voter impersonation, in which people's IDs or voter-registration cards have been stolen and false votes had been cast in those persons' names, is not uncommon. *See* A Bill Relating to Requiring a Voter to Present Proof of Identification: Hearing on Tex. H.B. 218 Before the House Comm. on Elections, 80th Leg., R.S. (Feb. 28, 2007), http://www.house.state.tx.us/committees/broadcasts.php?session=80&committeeCode=240 (testimony of Ed Johnson of the Harris County Tax Office); *id.*, Hearing on Tex. H.B. 218 Before S. Comm. on State Affairs, 80th Leg., R.S. (Apr. 30, 2007), http://www.senate.state.tx.us/avarchive/?yr=2007&lim=200 (testimony of Skipper Wallace, State Legislative

Chairman for the Republican County Chairmans Association).

In Harris County, for example, there was an instance in which one candidate in a primary election registered hundreds of voters, changed their addresses, and then voted for them on election day. *See* A Bill Relating to Requiring a Voter to Present Proof of Identification: Hearing on Tex. H.B. 218 Before the House Comm. on Elections, 80th Leg., R.S. (Feb. 28, 2007), http://www.house.state.tx.us/committees/broadcasts.php?session=80&committeeCode=240 (testimony of Ed Johnson). There have also been reports of stolen voter-registration cards, *see id.* (testimony of Skipper Wallace), a crime that makes sense only if one is intending to impersonate legal voters.

Other examples abound. Consider the case of Michael Zore who voted twice in 2006 by going to the polling stations of two Milwaukee, Wisconsin suburbs in the space of six hours. His excuse: "I forgot." The evidence against him, however, showed that he signed up to vote using a false address from one precinct when he already voted in another precinct. Derrick Nunnally, *Man Covicted of Double Voting: "I Forgot" Dosen't Get Toas Resident Off Hook*, MILWAUKEE J. SENTINEL, Aug. 22, 2007, http://www.jsonline.com/story/index.aspx?id=651215.

Another double voter was James Scherzer, an attorney, who cast two ballots in the same election several times in 2000 and 2002; he did this by voting in Kansas and then crossing the state line and voting again in Missouri. Mr. Scherzer acknowledged, "I was wrong in what I did." Greg Reeves, *One Person, One Vote? Not Always*, KANSAS CITY STAR, Sept. 5, 2004, http://www.angelfire.com/pa/sergeman/

issues/elections/onevote.html. And his case was but one of dozens of potential double-voting cases in Kansas City. *Id.*

Besides double voting, dead people casting votes is not an uncommon type of voting fraud. For example in the 2000 election, André Alismé, who died of cancer in 1997, had a ballot cast in his name in the presidential election. Manny Garcia & Tom Dubocq, *Unregistered Voters Cast Ballots in Dade: Dead Man's Vote, Scores of Others Were Allowed Illegally, Herald Finds*, MIAMI HERALD, Dec. 24, 2000, http://www.englishfirst.org/ballots/deadvote.htm. A November 2000 Atlanta Journal-Constitution report showed that between 1980 and 2000, there were more than 5,000 documented cases of people voting in Georgia after their deaths. Frank B. Strickland & Anne W. Lewis, *It's About Fraud, Not Jim Crow*, WASH. POST, Aug. 30, 2005, at A17. And in South Texas, as one local government watchdog stated, it is well known that "[d]own here, we have dead people vote," referring to the fraudulent practice of using dead voters' registration cards to cast extra ballots. Moreover, voter registration cards have been issued to imaginary voters and then distributed to real people who were not registered. Sara Perkins, *Valley Officials, Observers at Odds Over Need for New Voter ID Laws*, THE MONITOR, Apr. 24, 2007, http://www.themonitor.com/common/printer/view.php?db=monitortx&id=1855.

At the end of the day, there is considerable national evidence of in-person voter fraud. And, regardless of whether one believes that voter impersonation is widespread or relatively rare, there can be no serious dispute that its real effect can be substantial because, in a close election, even a small amount of fraud could make

the margin of difference. CARTER-BAKER COMM'N REP., at 18.

C. Congress and All 50 States Have Legislated to Prohibit and Prevent Voter Fraud.

Congress and all 50 States, the District of Columbia, and Puerto Rico have enacted some form of voter-ID law. Collectively, these laws provide a continuum of regulatory responses to polling-place fraud and ballot security.

At the federal level, the Help America Vote Act of 2002 (HAVA), Pub. L. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §15301, *et seq.*), mandated that all States require photo ID, or in lieu of a photo ID some other form of approved nonphotograhic ID, from first-time voters who registered to vote by mail and did not provide verification of their identity with their mail-in registration. *See* 42 U.S.C. §15483(b). Congress explicitly provided, however, that this requirement was only a "minimum requirement[]," that States could establish "requirements that are more strict," and that States have "discretion" in implementing HAVA's requirements. *Id.* §§15484, 15485.

Even after HAVA, the Commission on Federal Election Reform expressly found that"[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." CARTER-BAKER COMM'N REP., at 18. Pursuant to that finding, the Carter-Baker Commission explicitly recommended as follows:

> "[T]o make sure that a person arriving at a polling site is the same one who is named on the lists, *we propose a uniform system of voter identification* based on the 'REAL ID card' or an equivalent for people without a drivers license." *Id.*, at iv (emphasis added).

Consistent with both the federal mandate of HAVA and with the recommendation of the Carter-Baker Commission, the Indiana Legislature has chosen to require a valid photo ID at the ballot box.[1] Similarly, both Georgia and Missouri have enacted laws that strictly enforce a photo-ID requirement.[2] All of these laws allow a voter without ID to nonetheless cast a provisional ballot, but then count that provisional ballot only if either the voter's signature on file with the election authority can be verified or if the voter presents a valid photo ID to election officials within the time period for verifying provisional ballots.[3] Florida likewise requires all in-person voters to present a "current and valid picture identification."[4] And, like Indiana, Georgia, and Missouri, Florida allows a voter without photo ID to cast a provisional ballot, and that ballot will be counted only if the voter's signature on the provisional-ballot certification and affirmation matches the signature on the voter's registration or if written evidence confirms the voter's identity.[5]

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1. *See* IND. CODE ANN. §§3-5-2-40.5, & 3-11-8-25.1(a).

2. *See* GA. CODE ANN. §§21-2-417, & 21-2-417.1; MO. ANN. STAT. §115.427. In 2006, the Missouri Supreme Court declared §115.427's photo-ID requirement to be invalid under that State's constitution. *See Weinschenk* v. *State*, 203 S.W.3d 201, 204, 221-22 (Mo. 2006). Recently, the United States District Court for the Northern District of Georgia upheld Georgia's photo-ID requirement, finding that the plaintiffs did "not demonstrate[] that the Photo ID requirement place[d] an undue or significant burden on the right to vote" and that the Plaintiffs' equal-protection challenge was meritless. *See Common Cause/Georgia* v. *Billups*, 504 F.Supp.2d 1333, 1382 (N.D. Ga. 2007).

3. *See* GA. CODE ANN. §21-2-417(b); IND. CODE ANN. §§3-11-8-25.1(d), & 3-11.7-5-2.5; MO. ANN. STAT. §115.427(5).

4. *See* FLA. STAT. ANN. §§97.0535, 101.043.

5. *See id.* §101.048.

At the other end of the continuum are jurisdictions that have currently chosen to require less rigorous measures for ballot security. These jurisdictions include Arkansas, California, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming. Collectively, these States employ an array of voter-ID laws, including: (i) relying on an honor system of announcing one's identity and matching the person's name on the registration list,[6] (ii) requiring compliance with HAVA's minimum identification standards for first-time voters who registered by mail,[7] (iii) requesting but not requiring that a person provide photo or written ID,[8] (iv) asking for ID and a written affirmation of identity if a person does not

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6. *See, e.g.*, NEB. REV. STAT. ANN. §32-914(2)(a)-(b); N.H. REV. STAT. ANN. §659:13; N.Y. ELEC. LAW §8-302(2); VT. STAT. ANN. tit. 17, §2563.

7. *See, e.g.*, CAL. CODE REGS. tit. 2, §20107; D.C. CODE §1-1001.7(i)(6); IDAHO CODE §34-410; 10 ILL. COMP. STAT. ANN. 5/4-105; MISS. CODE ANN. §23-15-169.5; 21-000-021 MISS. CODE R. §§1-13; NEB. REV. STAT. ANN. §32-914(2)(c); NEV. REV. STAT. ANN. §293.2725(1)(a); N.J. STAT. ANN. §19:15-17(b); N.Y. ELEC. LAW §§8-302(2-a), & 8-303(1)-(2)(a)(1); N.Y. COMP. CODES R. & REGS. tit. 9, §6217.6(k); N.C. GEN. STAT. §163-166.12(a); OKLA. STAT. ANN. tit. 26, §7-115.2; OKLA. ADMIN. CODE §230:35-5-113.3; R.I. GEN. LAWS §17-20-6.2; VT. STAT. ANN. tit. 17, §2563; W. VA. CODE ANN. §3-2-10(g); WIS. STAT. ANN. §6.34(2)-(3); WYO. STAT. ANN. §22-3-118(b).

8. *See* ARK. CODE ANN. §7-5-305(a); 108-00-009 ARK. CODE R. §901 (Ar. State Bd. Election Comm'rs); HAW. REV. STAT. ANN. §11-136; MASS. GEN. LAWS ANN. ch.54, §76B(a); 950 MASS. CODE REGS. 52.03(5B).

appear on the election register,[9] (v) asking for ID and an attestation of identity if a person's identity is challenged,[10] (vi) requiring a person to sign an oath if their identity is challenged,[11] (vii) requiring a person to sign a poll book,[12] (viii) allowing a person without ID to vote if the voter provides his or her birth date and if a member of the election board or a clerk vouches for the individual,[13] or (ix) allowing a person without photo ID to vote, subject to challenge, if the voter executes an affidavit swearing to his or her identity.[14]

Between the two ends of the ballot-security continuum lie the voter-ID laws of Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Kansas, Kentucky, Montana, New Mexico, Ohio, Pennsylvania, Puerto Rico, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington. These laws do not employ the same rigor as a strict photo-ID requirement, but they incorporate more numerous and greater ballot-security controls than other States. For instance, several States take an intermediate approach that requires all persons to present either photographic ID, written ID, or another form of unique

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9. *See* IOWA CODE ANN. §49.77(4)(a); ME. REV. STAT. ANN. tit. 21-A, §121(1-A); MINN. STAT. ANN. §201.061(3); MINN. R. 8200.5500; N.H. REV. STAT. ANN. §§654:7-a(II), 654:12(III), 659:13.

10. *See* MD. CODE ANN., ELEC. LAW §10-312.

11. *See, e.g.*, CAL. ELEC. CODE §14243; D.C. CODE §1-1001.7(i)(1), (3); IOWA CODE ANN. §49.77(1).

12. *See* OR. REV. STAT. §254.385(1). Oregon is unique in that all elections there are conducted by mail. *See id.* §254.465. Nevertheless, "[a]t each primary election and general election, the county clerk [still must] maintain voting booths . . . ." *Id.* §254.474.

13. *See* N.D. CENT. CODE §16.1-05-07(1)-(3).

14. *See* LA. REV. STAT. ANN. §18:562(A); MICH. COMP. LAWS ANN. §168.523(1); S.D. CODIFIED LAWS §§12-18-6.1, -6.2; S.D. ADMIN. R. 5:02:05:25.

identifier before casting an in-person ballot.[15] Among these States, Arizona is unique in that it requires either one form of photo ID or *two* forms of written ID.[16] Alabama, Alaska, and Kentucky also require either photo or written ID, but the requirement will be waived if one or more election officers confirm the voter's identity.[17] Kansas and Pennsylvania require either photo ID or other written identification to cast an in-person ballot, but only for certain first-time voters.[18] Puerto Rico requires voters to present a photo ID issued by the Commonwealth's Election Commission.[19] Utah requires "valid voter identification" from an in-person voter only if it is indicated on the official register or if the poll worker does not know the voter and has reason to doubt the voter's identity.[20] And Texas requires that all in-person voters present their voter-registration cards to election officials.[21] If a voter does not have their registration card, he or she must execute an affidavit and present an accepted form of photo or written ID.[22]

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15. *See* ARIZ. REV. STAT. ANN. §16-579(A); COLO. REV. STAT. ANN. §§1-1-104(19.5), & 1-7-110(1)-(2); CONN. GEN. STAT. ANN. §9-261(a); DEL. CODE ANN. tit. 15, §4937(a); MONT. CODE ANN. §13-13-114(1)(a); MONT. ADMIN. R. 44.3.2102(6); N.M. STAT. ANN. §§1-1-24, 1-1-23, & 1-12-7.1(D); OHIO REV. CODE ANN. §3505.18(A)(1); OHIO ADMIN. CODE §111-12-03(C)(8); S.C. CODE ANN. §§7-5-620, & 7-13-710; TENN. CODE ANN. §2-7-112(a)(1), (c); VA. CODE ANN. §24.2-643(B); WASH. REV. CODE ANN. §§29A.08.113(1), & 29A.44.205.

16. *See* ARIZ. REV. STAT. ANN. §16-579(A).

17. *See* ALA. CODE §17-9-30(b), (f); ALASKA STAT. §15.15.225(a)-(b); KY. REV. STAT. ANN. §117.227.

18. *See* KAN. STAT. ANN. §25-2908(c)(4), (d), (h); 25 PA. CONS. STAT. ANN. §3050(a)-(a.1).

19. P.R. LAWS ANN. tit. 16, §§3059, 3061.

20. *See* UTAH CODE ANN. §§20A-3-104(1)(a)-(c), & 20A-3-105.5(4).

21. *See* TEX. ELEC. CODE ANN. §63.008(a).

22. *See id.* §§63.008(a), .0101.

Of course, none of these laws is static. Following the recommendation of the Carter-Baker Commission, a significant number of state legislatures are actively debating whether to require a photo ID to vote,[23] much as Indiana, Georgia, Missouri, and Florida have already done. Thus, the laws are in flux, with the legislatures of the several States vigorously fulfilling their constitutional roles as Justice Brandeis's famous laboratories to determine the precise policy prescriptions that best protect democratic integrity.

II. THE SEVENTH CIRCUIT WAS CORRECT TO APPLY THE "MORE FLEXIBLE" STANDARD OF THE "ORDINARY LITIGATION" TEST TO INDIANA'S PHOTO-ID REQUIREMENT.

In analyzing Indiana's photo-ID requirement, the Seventh Circuit refused to apply strict scrutiny and instead applied the "more flexible"[24] standard of the "ordinary litigation" test for statutes that "control the mechanics of the electoral process,"[25] as articulated in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), and its progeny.[26] *See Crawford* v. *Marion County Election Bd.*,

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23. *See* , *e.g.*,Ala H.B. 381, R.S. (2007); Cal. A.B. 9, R.S. (2007); Cal. S.B. 173, R.S. (2007); Ga. S. Res. 4, R.S. (2007); Ill. H.B. 3418, 95th Leg., R.S. (2007); Iowa S.F. 84, 82d Leg., R.S. (2007); Kan. S.B. 169, R.S. (2007); Md. S.B. 597, R.S. (2007); Mass. S.B. 440, 185th Leg., R.S. (2007); Minn. H.F. 121, 85th Leg., R.S. (2007); Miss. H.B. 309, 824, 920, 1386, 1388, 1408, S.B. 2038, 2121, 2256, 2617, 2700, R.S. (2007); Nev. S.B. 385, 74th Leg., R.S. (2007); N.M. H.B. 628, 48th Leg., R.S. (2007); N.C. H.B. 185, R.S. (2007); Okla. S.B. 15, 51st Leg., R.S. (2007); Tenn. H.B. 938, S.B. 227, 105th Leg., R.S. (2007); Tex. H.B. 218, 80th Leg., R.S. (2007); Wash. H.B. 1468, 60th Leg., R.S. (2007).

24. *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992).

25. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

26. *Norman* v. *Reed*, 502 U.S. 279, 288-89 (1992); *Burdick*, 504 U.S., at 434-40; *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351,

472 F.3d 949, 952-53 (CA7 2007). The Seventh Circuit was correct to do so. It cannot be that strict scrutiny applies—as Petitioners seem to claim—whenever so much as a single voter's ability to exercise his or her fundamental right to vote is burdened. Such a rule would be inconsistent with well-established precedent of this Court.

The right to vote is of course fundamental. *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992); *Ill. State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). But that right is not absolute. *Burdick*, 504 U.S., at 433; *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193 (1986). Under the Constitution, States are expressly authorized to regulate the times, places, and manner of holding elections, U.S. CONST. art. I, §4, cl.1; *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986), and, indeed, are compelled to take "an active role in structuring elections," *Burdick*, 504 U.S., at 433 (1992), to assure that the electoral process is orderly, fair, and honest. *Storer* v. *Brown*, 415 U.S. 724, 730 (1974).

All "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S., at 433. But there is no right to be free from any inconvenience or burden in voting. Indeed, a contrary rule would impermissibly "tie the hands of States seeking to assure elections are operated equitably and efficiently." *Id.* Thus, "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Id.*, at 441 (citing *Anderson*, 460 U.S., at 788; *Storer*, 415 U.S., at 730).

359-64 (1997); *Clingman* v. *Beaver*, 544 U.S. 581, 591-97 (2005).

In assessing a challenge to an election-law provision that regulates the electoral process, the Court's analysis focuses on "the relative interests of the State and the injured voters" and "evalute[s] the extent to which the State's interests necessitated the contested restrictions." *McIntyre*, 514 U.S., at 345. Specifically, the Court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson*, 460 U.S., at 789. Next, the Court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* The Court "determine[s] the legitimacy and strength of each of those interests," and "consider[s] the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* All of these factors are weighed "to decide whether the challenged provision is unconstitutional." *Id.*

When weighing the competing interests, a "'severe' restriction[]" upon the plaintiff's First and Fourteenth Amendment rights requires the challenged state election-law provision to be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S., at 434; *Norman*, 502 U.S., at 289. But a "reasonable, nondiscriminatory restriction[]" triggers a "less exacting review," *Timmons*, 520 U.S., at 358, and will generally be upheld if "important regulatory interests" support the State's election-law provision. *Burdick*, 504 U.S., at 434; *Anderson*, 460 U.S., at 788 & n.9. In making these determinations, "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 520 U.S., at 358 (citing *Storer*, 415 U.S., at 730).

The Seventh Circuit correctly applied the ordinary-litigation test because Indiana's photo-ID requirement is a component of that State's comprehensive scheme controlling participation in the electoral process. *See, e.g.*, *McIntyre*, 514 U.S., at 345 (explaining that because Ohio's statute prohibiting the distribution of anonymous campaign literature was not an election-law provision that controlled the mechanics of the electoral process but, rather, was a regulation of pure speech, the ordinary-litigation test did not apply). Other components of that scheme include extensive voter-registration laws, *see, e.g.*, IND. CODE ANN. §§3-7-10-1 to -48-10, regulations governing polling places, *see, e.g.*, *id.*, §§3-11-8-7 to -8, -10.5, & -16 to -18, and laws on casting provisional ballots, *see, e.g.*, *id.*, §§3-11.7-1-2 to -6-3, to name but a few. Like these other components of the State's scheme, the photo-ID provision is a type of time-place-and-manner restriction subject to the ordinary-litigation test of the *Anderson-Burdick* line of cases. The question thus reduces to whether the Seventh Circuit correctly assessed Indiana's photo-ID requirement under that test.

III. INDIANA'S PHOTO-ID REQUIREMENT PASSES CONSTITUTIONAL MUSTER UNDER THE ORDINARY LITIGATION TEST.

A. Requiring Photo ID Imposes a Negligible Burden on the Right to Vote.

Application of the ordinary-litigation test to Indiana's photo-ID provision starts with an assessment of the "character and magnitude" of Petitioners' asserted injury to their right to vote under the First and Fourteenth Amendments. The Seventh Circuit correctly identified the extent of the burden on the right to vote when it observed that "[t]here is not a single plaintiff who intends not to

vote because of the new law—that is, who would vote were it not for the law," and that "the sponsors of this litigation" found no "such person to join as a plaintiff." *Crawford*, 472 F.3d, at 952. This fact suggests that the burden here has more to do with "the Democratic Party and other organizational plaintiffs [having] to work harder to get every last one of their supporters to the polls," than it does with any voters being actually disenfranchised. *Id.*

Petitioners have not met their burden of demonstrating a significant burden on the individual right to vote. And, even apart from the slight evidence proffered by Petitioners on this question, the empirical data contradict their claim.

Although the data are subject to competing interpretations, the research as a whole suggests that voter-ID laws do not have any significant dampening effect on voter turnout. The strongest support for Petitioners can be found in a "preliminary" study conducted for the U.S. Election Assistance Commission by Rutgers University's Eagleton Institute of Politics and the Moritz College of Law at Ohio State University ("Eagleton Study"). In that study, Professor Timothy Vercellotti conducted a statistical analysis of the effect of voter-ID requirements on voter turnout in each State and the District of Columbia during the 2004 election. *See* Report to the U.S. Election Assistance Comm'n on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002, Eagleton Inst. of Pols., Rutgers, The State Univ. of N.J., & Moritz College of Law, Ohio State Univ. (2006). Professor Vercellotti and David Anderson presented a new version of the analysis to the 2006 American Political Science Association conference. *See* Timothy Vercellotti & David Anderson, Paper

Presented at 2006 Ann. Meeting of Am. Pol. Sci. Ass'n, Philadelphia, Pa., Aug. 31-Sept. 3, 2006: "Protecting the Franchise, or Restricting It?: The Effects of Voter Identification Requirements on Turnout," http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf. The Eagleton Study found that more stringent voter-ID requirements exerted some negative influence on turnout in the 2004 election. *See id.*, at 13. It determined that "[t]he overall effect for all registered voters was fairly small, but still statistically significant." *Id.*

Significant doubt, however, has been cast on the validity of the Eagleton Study's findings. *See* Jeffrey Milyo, Draft Policy Rep. for the Inst. of Pub. Pol'y in the Truman Sch. of Pub. Affairs, Univ. of Mo.: "The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis," at 6 (2007) [Milyo, "Effects of Photo ID on Voter Turnout"]. The methodology of the Eagleton Study has been criticized for its use of a one-tailed hypothesis test, instead of the more commonly accepted two-tailed test; for its misclassification of some 2004 voter ID laws; and for the inappropriate use of some variables. *See* David B. Muhlhausen & Keri Weber Sikich, A Report of the Heritage Center for Data Analysis, "New Analysis Shows Voter Identification Laws Do Not Reduce Turnout," at 6 (2007), http://www.heritage.org/Research/LegalIssues/upload/cda_07-04.pdf [Muhlhausen & Sikich, "Voter ID Laws Do Not Reduce Turnout"] (stating that Eagleton Study is "fatally flawed"). Particularly problematic is the Eagleton Study's use of the one-tailed test because it "allows researchers to double their chances of finding statistically significant results." *Id.*, at 2.

In 2007, a reanalysis of the Eagleton Study by David Muhlhausen and Keri Sikich of the Center for Data

Analysis at the Heritage Foundation ("Heritage Foundation Study"), using a two-tailed test, found "that voter identification requirements, such as requiring nonphoto and photo identification, have virtually no suppressive effect on reported voter turnout." *Id.*, at 21. The Heritage Foundation Study reported that when "[c]ontrolling for factors that influence voter turnout, states with stricter voter identification laws largely do not have the claimed negative impact on voter turnout when compared to states with more lenient voter identification laws," and that "minority respondents in states that required photo identification are just as likely to report voting as minority respondents from states that only required voters to say their name." *Id.*, at 22. Finally, the report also noted that "[w]hen statistically significant and negative relationships [were] found in [its] analysis, the effects [were] so small that the findings offer[ed] little policy significance." *Id.*

Another study by Professor John Lott of the State University of New York-Binghampton, Department of Economics ("Lott Study"), found that election regulations that can affect the cost of voting have no statistically significant negative impact on voter turnout. John R. Lott, Jr., Report: "Evidence of Voter Fraud and the Impact That Regulations to Reduce Fraud Have on Voter Participation Rates," at 11 (Rev. ed. 2006), http://www.vote.caltech.edu/VoterID/ssrn-id925611.pdf [Lott, "Voter Participation Rates"]. The Lott Study examined existing election regulations including nonphoto-ID laws that affected the cost of voting during the decade of 1996 to 2006, which although not as strict as mandatory photo-ID laws like those enacted in Indiana, Georgia, Missouri, and Florida, still made it more difficult for some people to vote. *See id.*, at 5. The study found that adopting a photo-ID

requirement "produced a drop in voter participation of 1.5 percent, a statistically insignificant change." *Id.*, at 7. And it found "only minimal support for the notion that IDs—whether photo IDs with substitution or non-photo IDs—reduce voting participation rates." *Id.*, at 8. But even more telling was its finding that nonphoto-ID requirements in areas identified as voter-fraud "hot spots" actually *increased* voting participation, supporting the hypothesis that "[g]reater confidence that the election is fair and that votes will be counted accurately encourages additional voter participation." *Id.*, at 10; *see also id.*, at 4.

Yet another study examined the change in voter turnout across Indiana counties before and after the implementation of photo-ID requirements prior to the 2006 general election. Milyo, "Effects of Photo ID on Voter Turnout," at 1. The study concluded that overall statewide turnout increased by 2% from 2002 to 2006 and that no consistent evidence existed to support the theory that counties with higher percentages of minority, poor, elderly, or less-educated population suffered a reduction in voter turnout relative to other counties. *Id.*, at 2, 18-19. In fact, the only consistent and statistically significant impact of photo ID in Indiana was to increase voter turnout for counties with a higher percentage of Democrat voters. *Id.*

In February of 2007, Professor Stephen Ansolabehere presented a paper at the New York University Law School's Election Law Symposium for the Annual Survey of American Law. His paper presented the findings of a 2006 collaborative survey project among 37 universities involving a 36,500-person national sample survey conducted over the Internet, which included a battery of

questions to gauge election-day practices and a handful of questions probing the use of voter ID. Stephen Ansolabehere, Elting R. Morison Professor, Dep't of Pol. Sci., MIT, Paper Presented at N.Y.U. Ann. Surv. Am. L. Symp.: "Access Versus Integrity in Voter Identification Requirements," at 3 (2007), http://web.mit.edu/polisci/portl/cces/material/NYU_Identification1.pdf [Ansolabehere, "Access Versus Integrity in Voter ID Requirements"]. In looking at the rate at which voter-ID requirements excluded or prevented people from voting, the survey found "[o]nly 23 people in the entire 36,500 person sample said they were not allowed to vote because of voter identification requirements," which "translates into approximately one-tenth of one percent of voters." *Id.*, at 7. According to the researchers, "[t]he real lesson from the data is that the total number of people who said they were not allowed to vote because of voter identification requirements [was] trivially small." *Id.* These findings and others led the survey to conclude that "[v]oter identification is the controversy that isn't," and the fact "[t]hat almost no one is prevented from voting because of voter ID requirements casts doubt on arguments from the left that this amounts to a new poll tax or literacy test." *Id.*, at 9.

Despite studies like these that show no statistically significant negative effect on voters because of voter-ID requirements, opponents of voter ID still maintain that requiring in-person voters to establish their identity by presenting an accepted form of photo ID negatively impacts the ability of minorities, the elderly, the disabled, and the poor to vote. *See, e.g.*, Brennan Ctr. for Just. at N.Y.U. Sch. of Law & Spencer Overton, Response to Report of 2005 Comm'n on Fed. Election Reform 3 (2005), http://www.carterbakerdissent.com/final_carterbaker_re

buttal092005.pdf. These voters, the argument goes, are less likely to possess driver's licenses or other forms of acceptable photo ID. *Id.* Pointing to research showing that between 6 and 10% of voting-age Americans do not have a driver's license or a state-issued non-license photo ID, these critics argue that those numbers translate into approximately 20 million eligible voters. *Id.* They also argue that, in terms of both time and money, the costs of obtaining such identification would deter voting and likely cause lower voter turnout among poor voters and those who do not have easy access to government offices. *See* Task Force on Fed. Election Sys., John Mark Hansen, *Chap. VI: Verification of Identity*, 4 (2001), http://www.tcf.Lorg/publications/electionreform/ncfer/hansen_chap6_verification.pdf.

But these figures can be misleading. For several reasons, they substantially overstate the magnitude of any effect on voter turnout. First, long history unfortunately demonstrates that a significant number of eligible voters will choose not to vote, regardless of whether there is any photo-ID requirement. Lott, "Voter Participation Rates," at 3. Second, of those who do choose to vote, many of those currently lacking photo IDs will choose to obtain photo IDs if needed to vote. *Id.*; Muhlhausen & Sikich, "Voter ID Laws Do Not Reduce Turnout," at 5. And third, the critics' figures do not address whether those individuals without driver's licenses have other accepted forms of photo ID or may otherwise cast valid ballots via absentee voting or exceptions for indigency. *See* Muhlhausen & Sikich, "Voter ID Laws Do Not Reduce Turnout," at 5.[27]

27. Perhaps a better measure of the difficulty voters face in meeting the photo-ID requirement is the percent of registered voters who have driver's licences. Lott, "Voter Participation Rates," at 3. But even this measure fails to take into account that people who currently

In sum, there is no study or other empirical data that definitively supports the claim that a photo-ID requirement will result in significant voter self-disenfranchisement. *See* Milyo, "Effects of Photo ID on Voter Turnout," at 2, 18-19. And the balance of the data is to the contrary.

Nevertheless, even assuming *arguendo* that there exists some hypothetical set of voters who (i) would have voted without a photo-ID law, but (ii) will not vote because of the time and effort required to obtain a photo ID, Petitioners' claim nonetheless fails, for three reasons.

First, every regulation on voting necessarily imposes some burden on voters. *See Anderson*, 460 U.S., at 788; *Burdick*, 504 U.S., at 433. Requiring preregistration burdens voters, setting Election Day on a Tuesday burdens voters, fixing a limited number of polling places burdens voters, keeping the polls open principally during business hours burdens voters, and restricting who is eligible for absentee voting burdens voters.

> "In fact, all democracies in history have placed restrictions on the power to vote. In modern times, the United States and other democracies have gone much further than ever before, and almost entirely for the good, in expanding the franchise. But restrictions on voting remain. Even the concept of 'adult' is up for grabs—how old must one be? Sixteen? Eighteen? Twenty-one? And why only citizens, a somewhat arbitrary concept that itself can be influenced—and limited—by law?" Debate, Prof. Bradley A. Smith of

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lack a photo ID may get one once it is required. *Id.* Not to mention, this measure can be exaggerated because the lists of registered voters may not be updated to eliminate people who have died or changed addresses. *Id.*

Capital Univ. Sch. of Law & Prof. Edward B. Foley of Ohio State Univ., "Voter ID: What's at Stake?," 156 U. PA. L. REV. (PENNUMBRA) 241, 252 (2007), at http://www.pennumbra.com/debates/pdfs/voterid.pdf [Debate].

The point is that each restriction drives up the time and expense of exercising the franchise, and yet each of these regulations is undoubtedly constitutional. The requirement of photo ID is not qualitatively different.

Second, the requirement of a photo ID is becoming all but ubiquitous in the modern age. Photo IDs are required to drive a car; to board an airplane; to travel abroad; to enter many state and federal government buildings; to buy alcohol or cigarettes; to purchase firearms; to obtain a hunting or fishing license; to open a bank account; to purchase medical prescriptions; to obtain most health care or dental care; to rent a hotel room, a car, or a DVD from Blockbuster; and even to watch an R-rated movie at the cinema. *See Crawford*, 472 F.3d, at 951 (stating that "it is exceedingly difficult to maneuver in today's America without a photo ID . . . and as a consequence the vast majority of adults have such identification").

And *third*, and most critically, Indiana has ensured that voters without a photo ID can obtain one *without cost*. IND. CODE ANN. §9-24-16-10. This case would be altogether different—and might even present serious issues under the Twenty-Fourth Amendment—if the State were to require a photo ID for voting and then to charge a significant amount to obtain a photo ID. But, following the Carter-Baker Commission's express recommendation, Indiana has ensured that government-issued photo IDs can be obtained free of cost. *See* CARTER-BAKER COMM'N REP., at 20 (stating that concerns over voter-ID

requirements presenting a barrier to voting can be addressed in part by assuring that government-issued photo ID is available without expense to any citizen).

In every election, some voters undoubtedly choose to disenfranchise themselves because of the perceived inconvenience or burden of voting. That is a disappointing fact of life, and turnout suffers for it. *See* Debate, at 253 ("[Photo ID] may keep a small number from voting, but it is not quite the same as denying them the vote. Every restriction on voting will burden the franchise, and at each step some small number of voters may decide voting is not worth the effort."). But it is no answer to have no controls or such low standards that the entire electoral process is vulnerable to manipulation and fraud. If such were the case, the voters' faith in our elections would be considerably shaken. And "[l]ittle can undermine democracy more than a widespread belief among the people that elections are neither fair nor legitimate." CARTER-BAKER COMM'N REP., at 1.

Thus, both the empirical data and the practical realities demonstrated that any burden on voting caused by the Indiana statute is negligible.

B. Photo-ID Requirements Curtail Voting Fraud and Help to Promote Voter Confidence in the Electoral Process.

On the other side of the scale is the State's interests that have been put forward as justifications for the photo-ID requirement. *See Burdick*, 504 U.S., at 434; *Anderson*, 460 U.S., at 789. As the Seventh Circuit recognized, "the purpose of the [photo-ID law] is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to

be an impairment of the right to vote." *Crawford*, 472 F.3d, at 952. Voting fraud compromises the integrity of the electoral process, and preserving the integrity of that process is indisputably a compelling state interest. *Purcell*, 127 S.Ct., at 7; *Eu*, 489 U.S., at 231. Concomitantly, fear of voting fraud can breed a lack of voter confidence in the integrity of the electoral process, driving honest voters away from the polls and breeding a distrust of government. *Id.*; *see* CARTER-BAKER COMM'N REP., at 18 ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."); Lott, "Voter Participation Rates," at 11 ("Regulations meant to prevent fraud can actually increase the voter participation rate[,]" especially "on turnout in counties where fraud is alleged to be rampant."). These interests are weighty and amply justify enactment of a photo-ID requirement.

Nevertheless, Petitioners question the legitimacy and strength of these interests, arguing that there is little or no evidence of voter-impersonation fraud, either in Indiana or about the country, that very few people have been convicted of illegal voting since 2002, and that claims of voting fraud are based largely on rumor, anecdote, and

speculation.[28] These claims are false, as has been demonstrated exhaustively in Part I, *supra*.

Moreover, unlike with many other forms of voting regulations, with photo-ID requirements the fundamental right to vote appears on both sides of the ledger: as a

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28. Petitioners place great reliance on the relative scarcity of criminal convictions for in-person voter fraud. *See* Pet'r Br. (07-025), at 43, 45, 48; Pet'r Br. (07-021), at 7. But other factors account for the difficulty of obtaining convictions in this area. Unsurprisingly, harried election officers often do not report incidents of voting impersonation and fraud, and law-enforcement officials frequently choose not to pursue such cases because they are not high on the D.A.'s priority list, are too onerous to prove, and are viewed as victimless crime that are treated leniently by judges and juries. *See, e.g.*, Sara Perkins, *Hidalgo County DA: Convictions Hard to Get in Voter Fraud Cases*, THE MONITOR, Aug. 4, 2007, http://www.themonitor.com/onset?id=4277&template=article.html.; Jennifer Liberto, *Vote Illegally, Get Caught: What Happens? Very Little*, ST. PETERSBURG TIMES, July 18, 2004, http://www.sptimes.com/2004/07/18/State/Vote_illegally__get_c.shtml; A Bill Relating to Requiring a Voter to Present Proof of Identification: Hearing on Tex. H.B. 218 Before S. Comm. on State Affairs, 80th Leg., R.S. (testimony of Skipper Wallace) ("[As a]n election worker, if you've ever worked as an election judge, you understand the hectic nature of the balloting process itself. It's very hurried, there are people waiting in lines. You want to move them through as fast as you can. You think this guy is impersonating somebody else but you don't have a lead pipe proof of stench, so you go ahead and let it ride. Well, then later you find out, well he did it. Well, you don't have any proof to be able go to a DA with to document that. There is a significant amount of evidence you have to take to actually prove up one of these cases—which makes it very difficult."). As the Seventh Circuit appropriately recognized, "the absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator." *Crawford*, 472 F.3d, at 953. Indeed, this difficulty in obtaining convictions after the fact is yet another reason for the Indiana Legislature to have focused on preventing the crime *ex ante*.

potential cost, if eligible voters are in fact kept away from the polls, but also as a potential benefit, if increased voter confidence increases turnout and avoids dilution of legal votes. Thus, both the supporters and the detractors of photo ID often focus on the same broad concern—protecting against vote dilution.[29] On the one hand, "[e]xcluding [otherwise] qualified voters from the polls . . . eliminates those votes from the count[] and dilutes the value of others who voted for the same candidate or party."[30] On the other hand, ballots that are cast unlawfully "dilute the value of qualified votes."[31]

At the end of the day, regardless of whether there are a multitude of people in Indiana or elsewhere who have been convicted for voting fraud or voter impersonation, that does not impugn the legitimacy of the State's interests in preventing voter fraud. The State need not "make a particularized showing" of the existence of voter impersonation and "does not have the burden of demonstrating empirically the objective effects on [the electoral process] that were produced by" the photo-ID requirement. *See Munro*, 479 U.S., at 195. Requiring States to show substantial evidence of voter impersonation

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29. Ansolabehere, "Access Versus Integrity in Voter Identification Requirements," at 1.

30. *Id.*

31. *Id.*; *see also, e.g.*, 148 CONG. REC. S10488 (Oct. 16, 2002) ("[I]llegal votes dilute the value of legally cast votes—a kind of disenfranchisement no less serious than not being able to cast a ballot.") (statement of Sen. Bond); *id.*, at S2529 (Apr. 11, 2002) ("These twin goals—making it easier to vote and harder to corrupt our Federal elections system—underpin every provision of [the HAVA of 2002]. These goals are fundamental to ensuring that not only does every eligible American have an equal opportunity to vote and have that vote counted, but that the integrity of the results is unquestioned.") (statement of Sen. Dodd).

as a predicate to the imposition of reasonable photo-ID requirements would "invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate" and would require "a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* State legislatures are not required to do that; instead, they are permitted to respond to potential voting fraud "with foresight rather than reactively." *Id.*; *see also Timmons*, 520 U.S., at 364 (stating that there is no requirement of "elaborate, empirical verification of the weightiness of the State's asserted justifications"); *Ind. Democratic Party* v. *Rokita*, 458 F.Supp.2d 775, 826 (S.D. Ind. 2006) (same); *Weinschenk*, 203 S.W.3d, at 229 (Limbaugh, J., dissenting) (same); *cf. FCC* v. *Beach Commc'ns*, 508 U.S. 307, 315 (1993) (regarding rational-basis review of an equal-protection challenge: "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

C. The Substantial State Interests Outweigh the Slight Burden on Petitioners' Interests.

Given all that has already been said about burdens and interests, all that remains is to weigh the respective advantages and disadvantages. *Burdick*, 504 U.S., at 434; *Anderson*, 460 U.S., at 789. No bright line demarcates the boundary between a constitutional and unconstitutional election regulation, and this weighing is not susceptible of a "litmus-paper test," *Timmons*, 520 U.S., at 358; *Storer*, 415 U.S., at 730. No judgment will be "automatic," *Anderson*, 460 U.S., at 789, but when an election law "imposes only reasonable, nondiscriminatory restrictions" on the right to vote, "'the State's important regulatory

interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S., at 434.

For the reasons given above, the burden on Petitioners' stated interest of voting in person without having to establish one's identity by presenting an accepted form of photographic likeness—and its purported effect of inducing eligible voters without ID to disenfranchise themselves—can only be characterized as negligible. Common sense and experience tell us that a government-issued photo ID is something that is readily available and easily obtainable. The fact that the vast majority of Indiana's registered voters, not to mention American adults, have one proves that. *See Ind. Democratic Party*, 458 F.Supp.2d, at 824.

Indeed, this commonsense balance is reflected in the widespread attitudes of American voters. For example, a Wall Street Journal/NBC poll in 2006 "found that 80% of voters favored a photo ID requirement, with 62% favoring it strongly. Only 7% were opposed."[32] Another poll similarly found that 82% of Americans, including 75% of Democrats, believe that "people should be required to show a driver's license or some other form of photo ID before they are allowed to vote."[33] And a recent survey found: (1) 95% of people who identify themselves as conservatives or as Republicans supported voter ID requirements; (2) slightly more than 70% of moderates and Independents expressed support; and (3) two-thirds of Democrats supported the idea, as did 60% of people who identified themselves as liberal and 50% who identified

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32. John Fund, *Jimmy Carter Is Right*, WALL ST. J., May 22, 2006, http://www.opinionjournal.com/diary/?id=110008411.

33. JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 5, 136 (2004).

themselves as very liberal.[34] When respondents were categorized by race, the findings were that over 70% of Whites, Hispanics, and Blacks support the requirement, and Black and Hispanic voters did not express measurably less support for voter ID requirements than Whites.[35]

This popular consensus is also reflected in the recommendations of the Carter-Baker Commission, which explicitly urged the adoption of photo-ID legislation. Thus, Petitioners' stated fears that photo-ID requirements are merely cloaked attempts at voter suppression are belied by the fact that requiring a photo ID to vote was urged by, *inter alia*, former President Jimmy Carter—surely not a proponent of suppressing minority and Democratic votes.

Because the burden on Petitioners' rights is slight, the weight of the State's interests need not be overwhelming. Even so, here the State's interest is substantial. The photo-ID requirement is reasonable and nondiscriminatory. It is an evenhanded regulation that applies equally to all voters regardless of party affiliation or any suspect classification. To the extent that the indigent lack the means to pay for a photo ID, Indiana's law provides them with a government-issued ID card free of charge, IND. CODE ANN. §9-24-16-10, and others may vote absentee without having to show proof of ID, *id.* §3-11-10-1.2. Preventing in-person voting fraud is undeniably an important state interest. Indeed, the State's compelling interest in protecting the integrity of the electoral process could well satisfy strict scrutiny, and *a fortiori* it suffices under the "more flexible" test of

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34. Ansolabehere, "Access Versus Integrity in Voter ID Requirements," at 4-5.

35. *Id.*, at 5.

Burdick. Because Indiana's voter-ID law is a reasonable, nondiscriminatory measure directed at the important state interest of preventing voting fraud, it is more than sufficient to outweigh the slight interest of those who wish to vote in person without having to show a photo ID. Indiana's photo-ID requirement should be upheld.

CONCLUSION

The Court should affirm the judgment of the Seventh Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

WILLIAM CRAWFORD, ET AL.,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, ET AL.
Respondents.

INDIANA DEMOCRATIC PARTY, ET AL.,
Petitioners,

v.

TODD ROKITA, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Washington Legal Foundation ("WLF") is a public interest law and policy center with supporters in all 50 states, including many in Indiana. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. In particular, WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to maintain the integrity of the electoral process, including the ability to ensure that voting is limited to those eligible to do so. *See, e.g., Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

INTRODUCTION

In 2005, the Indiana legislature enacted Pub. L. No. 109-2005 (the "Voter ID Law") and required each individual, who is otherwise eligible to vote, to provide at the polls on Election Day a federal or Indiana government-issued identification card that bears the individual's photograph and an expiration date. Petitioners contend that the Voter ID Law is unconstitutional because it imposes a severe burden on the right to vote, especially as to the poor, elderly, and disabled. This greatly exaggerates the effect of the law and equally overstates Petitioners' case.

To understand the law and its effect and to properly frame the issue, it is helpful to first observe some basic principles. The right to vote is not absolute. It is a regulated right. This is necessarily so because the right would be

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[1] Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, *amicus* states that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

meaningless without the restrictions that define it and create an orderly system for its exercise. Accordingly, the Constitution vests the States with the authority and obligation to create an orderly election process and to monitor it through rules regulating the time, place, and manner of elections. *See* U.S. Const. art. I, § 4, cl. 1.

The States may also set eligibility requirements that determine who has the right to vote. Indeed, the State of Indiana has set certain eligibility requirements, none of which are challenged here.

Consistent with its constitutional authority, the State has enacted numerous laws regulating the election process. These laws are in some sense restrictions on the right to vote; yet such minimal burdens are necessary to the orderly administration of elections and exercise of the right.

Indeed, it is without question that the State's power to set such restrictions on the right to vote entitle the State to impose some level of responsibility on the eligible voter and require him to take some initiative in order to exercise his right to vote. Thus, for example, the eligible voter who wishes to vote by absentee ballot must request his absentee ballot in a timely manner. If he fails to do so, then he may be left unable to vote. This is not an act of the State depriving his right to vote, rather the voter has relinquished his right. In other words, a person who declines to accept the responsibilities and reasonable burdens associated with exercising their right to vote simply may not vote.

The State's constitutional authority also includes the right to make rules that enable it to enforce its eligibility requirements. This enforcement authority is necessary to make the State's eligibility requirements meaningful. Thus, for

example, prior to the enactment of the Voter ID Law, the State required each eligible voter to sign a poll book before voting as a means of identifying himself as the registered voter. This rule is unchallenged; indeed, it is highlighted by Petitioners as their favored rule for the enforcement of the State's eligibility requirements. In other words, it is unquestioned that the State of Indiana has the right to require eligible voters to prove their identity in order to *exclude* from voting those who are *not* eligible. In fact, a state's failure to take reasonable measures to exclude the ineligible would improperly dilute the effect of each eligible voter's right to affect the outcome of the election.

Put into proper context, the question here is what the State of Indiana may do to effectively police its admittedly legitimate eligibility determinations. That is, pursuant to its authority and obligation under the Constitution, may the State of Indiana exercise its unquestioned right to enforce its unchallenged eligibility requirements by requiring eligible voters to display photo ID at the polls on Election Day?

SUMMARY OF ARGUMENT

Petitioners contend that the State may not impose a photo ID requirement because it effectively precludes certain people from voting. But who is it that is most likely not to vote because of the Voter ID Law? Principally, it is those who are ineligible to vote. Those people, however, have no right to vote; they are not injured by the Voter ID Law and have no standing to challenge the identification requirement. It is, after all, the entire point of the law to exclude those who do not have the right to vote. As a secondary matter, there are those who may elect not to take the minimal effort required to exercise the franchise. But the law does not *deny* these people the right to vote; rather, they voluntarily surrender their right to vote by virtue of their indifference. They, too, lack

standing, as the law has not injured them – they have chosen to disenfranchise themselves.

Petitioners suggest that a third group that could be affected by this law include the elderly, the poor, and the disabled. However, the Indiana legislature has considered their interests and has crafted exceptions to accommodate them in order to ensure them the opportunity to vote. It is therefore unsurprising that Petitioners have been unable to identify anyone who is eligible to vote but will be unable to vote *because of* the Voter ID Law. Indeed, Petitioners have abandoned completely their attempts to stand in the shoes of identifiable injured voters. Petitioners' failed (and now abandoned) effort to find a single injured voter to support their pre-enforcement challenge to the Voter ID Law suggests that their true interest is protecting the ability to vote of either the ineligible voter or the indifferent voter (or both).

Petitioners thus resort to asserting the rights of hypothetical voters who might be precluded from voting or who might simply fail to bring photo identification with them to the polls on election day. These groups cannot serve as a basis for standing. Among other reasons, Article III standing clearly does not extend to hypothetical individuals with speculative injuries.

The organizational Petitioners also cannot claim to be injured directly. Though they claim that they will be "forced" to expend resources toward voter education by virtue of the Voter ID Law, in reality they already expend substantial resources on registering sympathetic voters and persuading them to vote. Thus, cases in which a new law has foisted unforeseen and uncontrollable expenses on organizations are inapposite.

In cases such as this, where the States are acting within their constitutional power to regulate elections, constitutional challenges are analyzed under the test announced in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and clarified in *Burdick v. Takushi*, 504 U.S. 428 (1992). This test, which balances the burden on the rights at issue against the State's interests in enacting the regulation at issue, inherently recognizes that the right to vote is not always the only constitutional value at stake. It therefore avoids overly scrutinizing election laws that seek to vindicate a State's inherent and unquestionable right to run elections as it sees fit as well as laws that seek to prevent voter fraud and protect the right of eligible voters to have their votes count; any more stringent test – whether labeled as "strict scrutiny" or otherwise – simply does not properly take *all* relevant interests into account.

Petitioners attempt to distract the Court by focusing on the allegedly "severe" burden on certain hypothetical voters as individuals, arguing that if even one person is completely prevented from casting a ballot on election day, the burden is severe and the state's interests must be extremely weighty and narrowly crafted in order to survive. But this is merely a reprise of their failed standing argument; Petitioners have not shown any person or group of people who is eligible to vote and would be "burdened" by this requirement at all.

Moreover, Petitioners' focus on such hypothetical hard-luck voters misses the mark as a matter of law: the burden to be measured is the burden on the right at issue – the right of the people to associate with parties and candidates – and not the burden on getting to the polls. This must, therefore, be viewed on a much larger scale. Requirements that prospective voters register at least 29 days in advance of the election, show up at a certain time and place in order to cast a ballot, or request an absentee ballot well in advance of the election

might all be said to 'burden' the right to vote; yet such minimal burdens are necessary to the orderly administration of elections and exercise of the right and are undeniably valid. The Voter ID Law is no different. Moreover, the evidence shows that, as a whole, the Indiana voting population needs to do almost nothing in order to comply with the Voter ID Law. Most have the requisite identification and nearly everyone else meets one of the exceptions. The burden is light.

Comparatively, then, Indiana's interests need not be weighty in order to prevail. But based on the unquestionably true statement that Indiana has the right to determine its voting eligibility requirements and exclude those who do not meet those requirements, Indiana also clearly has the right to require eligible voters to prove their identity in order to enforce those requirements. Indeed, a State's failure to take reasonable measures to exclude the ineligible would improperly dilute the effect of each eligible voter's right to affect the outcome of the election.

Petitioners engage in sleight of hand by ignoring this and arguing that there is not sufficient evidence of in-person fraud in Indiana to justify a law requiring eligible voters to identify themselves. But even arguing on Petitioners' turf, the Indiana legislature was justified in responding to evidence of in-person voting fraud across the nation, the threat that fraud poses in close elections, and the evidence of declining confidence in the accuracy of elections. The Voter ID Law addresses all of those concerns.

Boiled down it to its essence, this case is not about disenfranchising anyone. Rather, this case is about the reasonable steps that States may take pursuant to their constitutional obligations to protect the constitutional rights of eligible voters to have their votes properly counted. The Voter

ID Law is an evenhanded regulation of elections that does not burden any particular group more than any other. It should be upheld as constitutional.

ARGUMENT

I. NO PETITIONER HAS STANDING TO CHALLENGE THE VOTER ID LAW

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and this Court has specifically and precisely outlined its requirements. The party invoking federal jurisdiction bears the burden of showing that it has standing to assert its claim. First, a plaintiff must establish that he has suffered "'injury in fact' – an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. In addition, the plaintiff must show that the injury can be fairly traced to the defendant and that the relief sought will redress the injury. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007); *Lujan*, 504 U.S. at 560-61.

Pivotal to the standing analysis is the injury in fact requirement. This Court has repeatedly explained that injury in fact must be "concrete and particularized," "actual and imminent," and "not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Mere speculation is not enough to establish an injury in fact. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) ("Abstract injury is not enough. The plaintiff must show that he has sustained or ir immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.") (internal quotations omitted); *see also Bennett*

v. Spear, 520 U.S. 154, 167 (1997). Where the plaintiff fails to establish that the asserted injury is concrete and actual, he lacks standing to bring his claim.

Moreover, the party seeking to invoke federal jurisdiction must support its assertion of standing in accordance with the factual showing required at the relevant stage of litigation. As the *Lujan* Court explained:

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . In response to a summary judgment motion, . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts.

Lujan, 504 U.S. at 561 (quotations omitted). Plaintiffs cannot rely on mere assertions of harm to meet their standing requirement.

A. Petitioners' Theories of Associational and Third-Party Standing Fail Because Petitioners Have Not Identified a Single Individual Who Is Injured by the Voter ID Law

Petitioners advance theories of associational and third-party standing that rely on the existence of individuals who are injured by the Indiana Voter ID Law. *See, e.g.*, *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (holding that associational standing requires, among other things, that the associational plaintiff's "members would otherwise have standing to sue in their own right").

Remarkably, Petitioners have failed to identify a single individual who will be precluded from voting by the Indiana Voter ID Law. As the district court found, voters "who face insurmountable barriers in obtaining photo identification prior to the election" would have standing to sue, but the "Democrats have not presented any substantiation that any such voters actually exist." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 811 (S.D. Ind. 2006). Indeed, it is quite revealing that Petitioners initially attempted to stand in the shoes of a dozen individuals who they claimed were injured by the Voter ID Law but no longer advance their alleged injuries as a basis for standing; this failure to find any legitimate, eligible voter who would be injured by the law signals that the only people this law precludes from voting are the illegitimate, ineligible ones.

Having abandoned their efforts to identify particular individuals who are injured by the Voter ID Law, Petitioners simply hypothesize (1) that there are persons who will be precluded from voting by the Indiana Voter ID Law and (2) that there are other individuals who have photo IDs that comply with the law but who will inadvertently fail to bring their photo IDs to the polls on Election Day. Neither hypothetical group of individuals can serve as a basis for Petitioners' standing.

As to the former group, Petitioners claim that there are people who will be precluded from voting due to the Voter ID Law, and that the Seventh Circuit recognized that such people must exist and are likely to be Democratic voters. Brief for Petitioners Indiana Democratic Party and Marion County Democratic Central Committee at 59, Indiana Democratic Party v. Rokita, No. 07-25 (U.S. Nov. 5, 2007) (citing Pet. App. 3a-4a) (hereafter "Pets. Br."). There are at least two flaws in this position. First, although the Seventh Circuit did

suggest that there must be people that would be harmed by the law, that court clearly was theorizing, as a matter of economic principle, that because the Indiana Voter ID Law imposes new requirements on Indiana voters it is logical to assume that it will impose a burden on some voters. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007). The Court in no way endorsed the idea that such hypothetical voters would have Article III standing or could serve as a basis for the standing of one or more of the Organizational Petitioners. Indeed, like the District Court, the Seventh Circuit emphasized that Petitioners failed to identify anyone injured by the law: "[T]here is something remarkable about the plaintiffs considered as a whole . . . . There is not a single plaintiff who intends not to vote because of the new law – that is, who would vote were it not for the law. . . . There thus are no plaintiffs whom the law will deter from voting." *Id.* at 951-52. Second, Petitioners' reliance on hypothetical injured voters cannot meet their burden on summary judgment; they have failed to demonstrate specific facts necessary to support their claim of standing. *Lujan*, 504 U.S. at 561.

Petitioners' reliance on individuals who have valid photo ID but will inadvertently fail to bring such ID to the polls on Election Day similarly falters. First, a person who has a valid photo ID but simply forgets to bring it to the polls on Election Day is not denied the opportunity to vote. Indeed, such a person is permitted to cast a provisional ballot, which will be counted if that would-be voter returns to the polls within 10 days with his or her ID. Ind. Code § 3-11-7.5-2.5. Second, Petitioners surely would not have standing to challenge laws regulating when polling places close based on the mere assertion that some people will not make it to the polls before closing time due to traffic or inclement weather. This situation is no different, and Petitioners have no such standing here. Finally, the existence of such voters is mere hypothesis, and as

indicated above, relying on hypothesis at the summary judgment stage is a losing proposition. *Lujan,* 504 U.S. at 561.

Simply put, Petitioners lack any evidence that any relevant individual is injured by the Voter ID Law. Accordingly, Petitioners cannot maintain either associational or third-party standing.

B. Petitioners' Theory of Direct Standing Fails Because Petitioners Are Not Themselves Injured by the Voter ID Law

Unable to find an eligible injured individual in whose shoes they can stand, Petitioners may maintain this action only if they can sue in their own right. Accordingly, Petitioners, relying principally on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), contend that they have direct standing to challenge the Voter ID Law because the law forces them to divert resources from their core activities and expend those resources "to counteract the law's corrosive effect on voter turnout." Pets. Br. at 56. Petitioners' position overstates the effect of the Voter ID Law on their activities; they simply do not fit within the rule of *Havens*.

In *Havens*, an organizational plaintiff, Housing Opportunities Made Equal ("HOME"), filed suit against an apartment complex owner, alleging that the owner's racial steering practices were unlawful. 455 U.S. at 368-69. HOME alleged that it had expended significant resources to identify and counteract the defendant's discriminatory practices and sought to recover the resources it had already expended fighting the housing discrimination that was taking place. *Id.* at 369, 379. The Court concluded that HOME had standing to bring the suit, explaining that the defendant's conduct

"perceptibly impaired" HOME's mission and resulted in a "drain on the organization's resources." *Id.* at 379. *Havens* therefore clearly contemplates an actual "concrete and demonstrable" injury to the organization for the organization to have standing in its own right. *Id.*

Petitioners do not fit within this rule. They have not shown any "concrete and demonstrable" harm such as the expenditure of resources incurred by HOME in *Havens* (or that such an expenditure of resources is required by the law). Rather, Petitioners simply contend that they will "divert [the Democrats'] limited resources away from activities such as get-out-the-vote efforts and providing resources for Democratic Party candidates." Pets. Br. at 57. However, that Petitioners may elect on their own to expend their resources in a certain way in the future is not an injury under *Havens*. As the D.C. Circuit has explained, "[t]he diversion of resources . . . might well harm the [plaintiff's] other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff's] own budgetary choices." *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994). Simply put, neither the Democratic Party's allegations that it *may* expend funds in the future nor its unilateral decision to do so is sufficient to establish standing under *Havens*. Moreover, any additional cost incurred is at most a marginal addition to "get out and vote" activities routinely conducted by political parties.

The reality that none of the plaintiffs in this suit satisfy the standing requirements does not mean that some other party at some other point may not properly challenge the Voter ID law. Indeed, as Justice Stevens explained in his concurrence

to the *per curiam* order vacating the stay of a similar Arizona voter identification law:

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring). Similarly, the Voter ID Law would be better analyzed with historical facts rather than on the basis of Petitioners' speculative injuries.

II. THE VOTER ID LAW IS CONSTITUTIONAL

A. The Constitutionality of the Voter ID Law Should Be Resolved Under the *Anderson/Burdick* Balancing Test

Petitioners argue that the Voter ID Law should be subject to strict scrutiny. *See* Indiana Democratic Party Petition for a Writ of Certiorari at 25, Indiana Democratic Party v. Rokita, No. 07-25 (U.S. July 2, 2007); Reply in Support of Petition for Writ of Certiorari at 5-8, Indiana Democratic Party v. Rokita, No. 07-25 (U.S. Aug. 17, 2007); Pets. Br. at 25-30. Their continuous refrain is that if even one person is prevented from voting by operation of the law, then strict scrutiny is

appropriate, even, it would seem, if the person is not eligible to vote. *See* Pets. Br. at 33. This is simply not an accurate statement of this Court's jurisprudence with regard to election regulations, and belies common sense.

As this Court has recognized, each election law "inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Nevertheless, in light of the fact that state laws determining voter eligibility are useless without some sort of enforcement mechanism, "the state's important regulatory interests are generally sufficient." *Anderson*, 460 U.S. at 788. And the Court has made explicit that strict scrutiny does not apply in all challenges to state laws regulating elections. *See Burdick*, 504 U.S. 428. Indeed, under *Anderson* and *Burdick*, this Court has made plain that election regulations are generally subject to a balancing test that weighs the burden on the right involved against the State's asserted justification for the law.

In *Anderson*, the Court explained that, although election and voting laws often burden in some way the individual's right to vote for the candidate of his or her choice, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *See Anderson*, 460 U.S. at 788; *see also id.* at n.9 ("We have upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself."). Thus, the court devised a specific balancing test to determine the validity of a law, under which a court:

> [M]ust first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise

> interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

In *Burdick*, this Court formally rejected the idea that "a law that imposes any burden upon the right to vote must be subject to strict scrutiny." 504 U.S. at 432. The Court explained that, in contrast to strict scrutiny, it had determined in *Anderson* that that case's "more flexible standard applies," and that a "severe" restriction on First and Fourteenth Amendment rights must be justified by a relatively more compelling State interest tailored more closely to the interest at hand than where the state election law imposes a "reasonable, nondiscriminatory restriction[]" upon those rights, where the State's interest can be less compelling and tailored more loosely towards achieving its desired ends.[2] *Id.* at 434 (citing *Anderson*, 460 U.S. at 788).

The Court's balancing test for election regulations reflects the fact that the individual voter's right is not the only constitutional value in the judicial calculus. First, the Constitution vests the States with the authority and obligation

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[2] Thus, the Court emphasized that laws that burden the right to vote do not fit within its classic rational basis/intermediate scrutiny/strict scrutiny rubric, and the *Anderson/Burdick* test is itself the test that determines constitutionality, rather than simply being a conduit to determining the level of scrutiny that should apply.

to regulate the voting process. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, [including] registration, supervision of voting, protection of voters, [and] *prevention of fraud and corrupt practices*.") (emphasis added); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest."). Indeed, this Court has acknowledged that engaging in strict scrutiny would improperly "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433; *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Second, where election regulations seek to protect the integrity of the voting process, they address the problem of vote dilution by unauthorized participation and the constitutional right of qualified voters to have their votes count. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *see also United States v. Saylor*, 322 U.S. 385, 387 (1994) (the right to vote includes the right to have one's vote counted).

The Court's development of the *Anderson/Burdick* balancing test reflects that the Constitution gives states the power to determine who can vote (within constitutional constraints), takes account of the fact that the states have an interest in enforcing those judgments, and gives the states leeway to do so when acting to protect such legitimate interests. Thus, in light of these values, the judicial inquiry under the *Anderson/Burdick* balancing test is not an overly

searching one. As the Seventh Circuit has explained, "striking of the balance between discouraging fraud and other abuses and encouraging voter turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry," *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004), as it implicates both federalism and separation of powers concerns.

The Voter ID Law is a "generally applicable and evenhanded" regulation designed to "protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. It implicates the State's constitutional authority to regulate the voting process and places constitutional rights on both sides of the ledger. *See Crawford*, 472 F.3d at 952 ("A strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger. . . . The purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote."). Thus, the Court's *Anderson/Burdick* balancing test is especially appropriate here.

B. Indiana's Interest in Preventing Voter Fraud Outweighs the Minimal Burden the Voter ID Law Places on Indiana Voters

"Effective voter registration and voter identification are bedrocks of a modern election system." *Building Confidence in U.S. Elections*, Report of the Commission on Federal Election Reform 9 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf (last visited Dec. 7, 2007) (hereafter "Carter-Baker Report"). Recognizing this fact, Indiana has engaged in a two-step

process to improve both voter registration – by purging its voter rolls of ineligible, deceased, or relocated voters – and voter identification – by enacting the Voter ID Law. Petitioners attempt to derail this process by attacking the Voter ID Law as unnecessary and overly burdensome. All evidence is to the contrary.

1. The Burden on the Right to Vote is Slight

Any law regulating who can vote, or when, where, or how people can vote necessarily burdens to some degree the right of some person to vote. It may be a person under the age of 18, or a felon, or an alien – legal or illegal, or someone who is simply too lazy or apathetic to make the effort. But not all burdens are created equal; thus, under the *Anderson/Burdick* test, the Court "must first consider the character and magnitude of the asserted injury to the rights protected." *Anderson*, 460 U.S. at 789.

In this case, the nature and magnitude of the injury is slight; indeed, the effect on Petitioners is so slight that it does not meet the test of constitutional relevance required for Article III standing. *See supra* Section I. As discussed above, Petitioners have offered no evidence that any individual who is eligible to vote will be denied the right to vote and simply speculate that some hypothetical voter might be unable to vote because the Voter ID law will effectively prevent him from voting. *See supra* Part I.A; *see also* Pets. Br. at 59 (resting on the notion that "there can be no doubt that these people exist"). The fact that Petitioners (a major political party, several public interest groups, and two elected officials), despite considerable time and resources, have not been able to locate a single person who can assert any injury greater than mere inconvenience is telling. In fact, it demonstrates conclusively that the burden on the right to vote is minimal. *See Rokita*,

458 F. Supp. 2d at 823 (stating that although the court does "not doubt that such individuals exist somewhere," the difficulty in finding someone burdened by the law is "a testament to the law's minimal burden and narrow crafting"); *Crawford*, 472 F.3d at 951-52.

Perhaps due to awareness of their difficulty identifying any injury resulting from the Indiana Voter ID Law, Petitioners focus instead on the practical effect of the law at a more granular level. They highlight the practical costs of the law in terms of time, transportation, and the costs associated with obtaining qualifying identification and argue that these costs constitute a "severe" burden that falls unevenly on the poor, elderly, and disabled. *See* Pets. Br. at 12-20; *see also Rokita*, 458 F. Supp. 2d at 795. In support, they have attempted to show that some segment of the population does not currently have valid identification and that it might be difficult for those people to obtain such identification. *See Rokita*, 458 F. Supp. 2d at 791-796.

But the evidence simply does not bear out any such claim. As the district court noted, Petitioners' own expert reported that 99% of registered Indiana voters already possess identification that is valid under the Voter ID Law, and that number is expected to increase in the coming months and years. *Rokita*, 458 F. Supp. 2d at 807. And of the 1% that does not already have valid identification, most are concentrated in Marion County, Indiana, with easy access to public transportation and multiple Bureau of Motor Vehicles branches, *see id.*, making it relatively easy to obtain qualifying identification. In all, the evidence presented to the district

court regarding the disparate impact on any particular group was inconclusive.[3] *See id.* at 805-809.

That Petitioners have been unable to demonstrate that the poor, disabled, and elderly are hurt by this law is unsurprising. The law takes into account their interests and accommodates them. There are exceptions to the photo ID requirement for absentee voters and those living in nursing homes; in addition, those who are indigent and cannot afford to obtain a qualifying photo ID (as well as those who have religious objections to being photographed) may avoid the photo ID requirement and cast a provisional ballot that will be counted if they file an affidavit indicating that they cast the ballot in question. *See* Ind. Code §§ 3-10-1-7.2(e); 3-11-8-25.1(f); 3-11-10-1.2; 3-11-7.5-2.5(a), (c); 3-11-7.5-1. Given all of these exceptions, it is no surprise that Petitioners have not only been unsuccessful in attempting to identify a single eligible individual who would actually be prevented from casting a vote in an election under Indiana's law, but also cannot locate a person who would suffer more than the inconvenience of a trip to the Bureau of Motor Vehicles or casting a provisional ballot and filing an affidavit.

That the burden of the Voter ID Law is slight is highlighted by the work of the multi-partisan Commission on Federal Election Reform, headed by former President Jimmy

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[3] Notably, the district court found as fact that the Voter ID Law's burdens do not fall more harshly on any groups than any other groups. *See Rokita*, 458 F. Supp. 2d at 823-24. The evidence submitted by the Petitioners in the district court was wholly inconclusive as to how the identification requirement impacts the poor, *see id.* at 806, and altogether showed that those who would have the most difficult time obtaining a photo ID easily — the elderly and the disabled — met at least one of the exceptions built into the law. *See id.* at 823-24.

Carter and former Secretary of State James Baker (the "Commission"). The Commission, which was convened to discuss possible reforms to all facets of United States elections, issued a report favoring implementation of a voter identification requirement. *See* Carter-Baker Report at 21. Recognizing that such a requirement would burden to some degree a small number of people, the Commission suggested implementing safeguards that it believed would lessen the burden. The Voter ID Law implements the Commission's major recommendations by providing for the availability of provisional ballots to those who arrive at a polling place without proper ID, *see* Carter-Baker Report at *iv*, 19, and providing that non-driver identification cards will be issued free of charge, *see* Carter-Baker Report at 20.

There are other indicators that a photo ID requirement is not unduly burdensome. For instance, as the Commission recognized, "[p]hoto IDs currently are needed to board a plane,[4] enter federal buildings, and cash a check. Voting is equally important." *Id.* at 18. As many public and private institutions begin to worry more about security, it is clear that in the very near future, participation in society in any kind of capacity will require some kind of identification. The burden on the right to vote is thereby diffused because it is shared with the need for the same identification for almost every other activity in life.

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[4] Notably, the right to interstate travel, just like the right to vote, lies within the Constitution. *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966) ("The right to interstate travel is a right that the Constitution itself guarantees."). Yet, if plaintiffs mounted a constitutional challenge to the requirement that airline passengers display photo ID to TSA agents before passing through airport security, they would surely fail.

In addition, that federal law is moving in this direction further demonstrates that the burden of the Voter ID Law is minimal. The Help America Vote Act, which requires that first-time voters present identification when voting if they registered to vote by mail, contemplates the use of photo ID. *See* Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1712 (codified at 42 U.S.C. 15483(b)(2)); *see also* Carter-Baker Report at 2. More importantly, the REAL ID Act, which was signed into law in May 2005 and is being phased in through 2010, will require states to verify an individual's full legal name, date of birth, address, Social Security number, and United States citizenship before issuing a driver's license or non-driver identification card. The Commission recommended that States begin using the REAL ID to verify voter identities. *See* Carter-Baker Report at 19.

These federal laws further highlight that the burden on the right to vote posed by the Voter ID Law is slight, as it is clear that any person who wishes to drive or receive a state identification card in the near future for any purpose will need to meet the same (or even more stringent) evidentiary requirements as the Indiana law requires here. Thus, given the wide-ranging (and ever-growing) list of activities requiring identification, people lacking proper identification will soon have more of an incentive to obtain such identification than simply the ability to vote.

Further evidence of the reasonableness of Indiana's photo ID requirement and the minimal burden it imposes exists outside of this country. The requirement of showing proper identification is not unique to this country, and most democracies have a much higher voter turnout than we do here in the United States. As the Commission found, "voter registration in many countries is often tied directly to a voter ID, so that voter identification can enhance ballot integrity

without raising barriers to voting. Voters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." Carter-Baker Report at 5.[5]

Based on this evidence, it is clear that the only people "severely" burdened by this law are those who are ineligible to vote in the first place. Nearly everyone else either already possesses valid identification or meets one of the exceptions within the law that will allow him or her to cast a vote on election day and have it counted. The state need not go out of its way to make it so that one can vote with only the most minimal expenditure of time or effort, yet Petitioners seem to argue that a state must do so lest it be considered a "burden" on the right. This is simply not a "burden" cognizable by the Constitution.

2. Indiana's Interest in Preventing Voter Fraud is Sufficient to Overcome This Slight Burden

After examining the character and magnitude of the asserted injury, this Court must consider "the precise interests put forward by the State as justifications for the burden imposed by its rule," which includes those interests' "legitimacy and strength" and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. Because Petitioners have shown

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[5] For example, all voters in Mexico must present voter IDs, which include not only a photo but also a thumbprint. "The IDs themselves are essentially counterfeit-proof, with special holographic images, imbedded security codes, and a magnetic strip with still more security information. As an extra precaution, voters' fingers are dipped in indelible ink to prevent people from voting multiple times." John R. Lott, Jr., Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud have on Voter Participation Rates (Aug. 18, 2006), *available at* SSRN: http://ssrn.com/abstract=925611 (last visited Dec. 7, 2007).

only minimal, if any, burden on the right to vote because of the Voter ID Law, the State's evidentiary burden is comparatively low. *See Burdick*, 504 U.S. at 439 ("Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction."). Indeed, it would be somewhat nonsensical under a balancing test to demand any evidentiary showing from the State where Petitioners have failed to show any evidence of injury or harm.

Regardless, Indiana's justification for the Voter ID Law – preventing and combating in-person election fraud – is both legitimate and compelling. *See Purcell*, 127 S. Ct. at 7 (highlighting "the State's compelling interest in preventing voter fraud"); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). Indiana clearly has the ability to determine who can vote, and its eligibility rules are unchallenged. That the State has an interest in making sure that these determinations are upheld follows as a matter of course. And the means by which it has chosen to combat such fraud are tailored closely to the ends it seeks. Aware of their evidentiary failures, Petitioners focus on the fundamental nature of the right to vote and appear to argue that even any marginal degradation of this right is constitutionally problematic. *See* Pets. Br. at 31-33. Ultimately, Petitioners' arguments do nothing to overcome the State's showing that the minimal burdens imposed by the Voter ID Law are more than supported by the state's authority and obligation to regulate the election process, coupled with the need to prevent and combat in-person voter fraud.

a. In-Person Voting Fraud is Prevalent, Even if Not Yet Detected in Indiana

The Commission reported that in-person voting fraud occurs even though, due to the nature of the crime, it is difficult to measure and identify. Carter-Baker Report at 45 ("While election fraud is difficult to measure, it occurs."). It also related many familiar indicators of fraud, including investigations by the Department of Justice and state and local officials, *id.*; the November 2004 Washington state gubernatorial election, in which 1,600 fraudulent ballots were cast, which resulted in Christine Gregoire being elected governor by a 129-vote margin, *id.* at 4, 90; and evidence that more than 200 felons voted illegally and 100 people voted twice, used fake names or false addresses, or voted in the names of dead people in Milwaukee, *id.*

Additionally, a 1997 congressional investigation found that up to 4,023 illegal voters cast ballots in a close House of Representatives election in California, and the Justice Department discovered after the September 11 terrorist attacks on our country that 8 of the 19 hijackers were registered to vote. John Fund, *This Will Make Voter Fraud Easier*, The Wall Street Journal, Nov. 2, 2007. The district court noted other evidence of fraud, as reported by several different studies, investigations, and media reports. *See Rokita*, 458 F. Supp. 2d at 793-94. The details of each study are different, but the results are the same: in-person voting fraud occurs. Thus, because Indiana has an interest in limiting its elections to only eligible voters, the Indiana legislature was completely justified in its decision to do something about it.

There is also clearly the *potential* for widespread in-person voting fraud in Indiana, even if the detailed accounts of voter fraud above have not been linked to that State, because

of Indiana's inflated voter rolls. As the State has explained at each stage of this case, investigations and studies have revealed that at least 300 dead people were still registered to vote in Indiana in 2000 (a more scientific study found that approximately 35,699 dead people were registered to vote in 2004), and that the voter rolls included 4.3 million Indianans, but only 3 million self-reported as being registered. *See* Brief of Appellees Rokita, King, and Robertson and Intervenor/Appellee the State of Indiana at 6, Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007) (Nos. 06-2218, 06-2317). Indiana's voter registration records are so at odds with reality that the state supreme court has decided not to use such records to compile jury pools. *Id.* at 5-6. List inflation is a genuine problem because registration lists containing the names of ineligible voters, many of whom are most likely known to others still residing in the state, makes it easier and therefore more tempting to vote in a name other than one's own. *See* John Fund, Stealing Elections 4 (2004); Larry J. Sabato & Glenn R. Simpson, Dirty Little Secrets 292, 321 (1996).

b. Voting Fraud Could Affect the Outcome of Close Elections and Diminishes Confidence in Election Results

The Commission reported that both fraud and multiple voting occur and "could affect the outcome of a close election." Carter-Baker Report at 18. In addition to Governor Gregoire's narrow win in 2004, there are many other notable closely contested elections in American history,[6] including

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[6] For example, former Chief Justice Charles Evans Hughes was nearly President of the United States himself, but for Woodrow Wilson's 3,773-vote victory in California, which secured him that state's 13 electoral

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several recent elections. In 1974, Louis Wyman beat competitor John Durkin in the New Hampshire senatorial election by a margin of only 2 votes, out of 223,363 cast. *See* http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000782 (last visited Dec. 7, 2007). In 2005, Bob McDonnell was named the winner of the race for Virginia Attorney General by a margin of 323 votes out of 1,943,250 cast. *See* http://www2.sbe.virginia.gov/web_docs/Election/results/2005/nov2005/html/ (last visited Dec. 7, 2007). In Colorado, Bob Beauprez defeated Mike Feeley by 121 votes out of 175,938 cast to win election to the House of Representatives in 2002. T.R. Reid, *GOP Wins 2002's Closest Congressional Race*, Washington Post, Dec. 11, 2002, at A7. Finally, no one needs to be reminded that the 2000 presidential election was decided by a mere 537 votes in Florida, which gave George W. Bush Florida's electoral votes and ultimately secured to him the Presidency. *See* http://uselectionatlas.org/RESULTS/national.php?year=2000 (last visited Dec. 7, 2007). With results so close, any of these elections could have been or may have been swayed by election fraud, including in-

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[6](...continued)
votes and the victory in the 1916 presidential election. *See* http://uselectionatlas.org/RESULTS/state.php?year=1916&fips=6&f=1&off=0&elect=0 (last visited Dec. 7, 2007).

person fraud.[7] Petitioners do not dispute this, and have even cited evidence of other close elections. *See* Pets. Br. at 19-20.

Moreover, confidence in elections is an end unto itself, for as the Commission stated, "[b]uilding confidence in U.S. elections is central to our nation's democracy." Carter-Baker Report at iv. This Court has likewise recognized that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 127 S. Ct. at 7.

The district court noted the already significant evidence of a lack of confidence in the accuracy of election results. *See Rokita*, 458 F. Supp. 2d at 794 (discussing studies showing 59% of voters believing there was "a lot" or "some" election fraud and 67% of adults having "some" or "very little" confidence in election results); *see also* John Fund, Stealing Elections at 2. The very perception of possible fraud causes nearly everyone to lose some degree of confidence in the system at large as well as the results of a particular election, and a solid identification system "could deter, detect, or eliminate several potential avenues of fraud." Carter-Baker Report at 18. Clearly this is a problem in need of a solution:

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[7] Overall shifts in the balance of power also depend on relatively few votes being cast one way or another. According to security expert Bruce Schneier, who examined the potential for fraud in the 2004 congressional elections, Democrats could have added 13 seats and claimed a majority in the House of Representatives in 2002 by swinging 49,469 votes, or just over 1% of the 4.3 million total votes cast in those races (and only .01% of the 70 million votes cast in congressional races nationwide) that year. *See* http://www.schneier.com/essay-046.html (last visited Dec. 7, 2007).

"The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.*

c. ID Requirements Are a Necessary Tool in Preventing In-Person Election Fraud

An identification requirement is an important tool that can be used to ensure that only people eligible and registered to vote are voting. "A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list." Carter-Baker Report at 18. As the Commission noted, approximately 40 million people move each year, and in many urban environments (and even small towns) people simply do not know their neighbors in the way that they used to. *Id.* So simply cleaning up the voter rolls is only part of the solution to the problem of combating voter fraud; instituting some kind of voter identification system is another. Petitioners' attempt to place blame on the State for the potential for in-person fraud based on the State's past failure to purge ineligible voters from its rolls, *see* Pets. Br. at 52-53, therefore misses the point entirely: Even if the rolls were accurate, Indiana still has an interest in making sure that those who show up at the polls are the people registered to vote. The only way for Indiana to accomplish this goal is to mandate that voters present a relatively fool-proof form of identification before casting a ballot.[8]

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[8] In addition, a photo ID requirement makes for ease in administration. Verifying the name and face on a photo ID is much easier for poll workers than comparing signatures. Thus, a photo ID requirement will reduce the likelihood of Election Day identity challenges and tend to

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Indeed, the Commission specifically rejected the idea that the evidence of in-person fraud was so thin that voter identification requirements should be eliminated because it believed "that citizens should identify themselves as the correct person on the registration list when they vote." Carter-Baker Report at 18. But again, regardless of the magnitude of in-person fraud, any amount of fraud occurring in a close or disputed election could make up the margin of difference. *See id.* A voter identification requirement is thus at least a useful, if not necessary, feature of any attempt to prevent and combat voting fraud.

Petitioners argue, however, that, as a matter of United States constitutional law, Indiana must wait until some in-person fraud of a great magnitude is detected in Indiana before taking action to prevent fraud from occurring. *See* Pets. Br. at 42-49 (arguing the lack of evidence of such fraud). But it is clear that the best way to ensure the integrity of Indiana's elections is to "prevent fraud before it can affect an election." Carter-Baker Report at 45. This Court has expressly stated that legislatures are permitted to operate prospectively to prevent harm to the electoral process. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."). This follows directly from the fact that the Constitution places

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[8](...continued)
have the effect of speeding up the process as a whole and curtailing voter intimidation.

the authority to regulate nearly all aspects of how elections will be conducted and who is eligible to vote with the states; the states' legislative judgments are not to be held up for cavalier second-guessing.

Simply put, the Indiana legislature, consistent with its constitutional authority and obligation, has determined that in-person fraud is an important issue that needs to be addressed. The Voter ID Law reflects the legislature's considered judgment and delicate balancing of the goal of promoting voter turnout and the compelling interest in preventing in-person voting fraud. Petitioners have failed to demonstrate a reason to disturb this balance. The Voter ID Law should stand.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Respondents' brief, the Court should affirm the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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